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CONVEYANCER'S NOTEBOOK.

SIR WILLIAM HOLDSWORTH, O.M.

The passing of Professor Sir William Holdsworth marks, we think, the passing of an epoch in the history of our law. Sir William was one of the three giants, of whom the others were, of course, Professor Maitland and Sir Frederick Pollock (also a professor in his time), who laid the foundations of a sound approach to our historic law. It was not that before their time lawyers were unaware of the value of the historical approach. The greatest classic of the land law, *Coke on Littleton*, was full of "history". Blackstone was always summoning up the ghosts of bygone ages. But these three made scientific and historical law the handmaid of the modern lawyer. Of them all we suspect that the work of Sir William will be most generally used. Volume VII of the *History of English Law* will be the starting point at least for any investigation of the odd problems in property law that require us to go back beyond the more or less immediate present. Maitland was too concerned with origins for the modern lawyer to be much affected by many of his "findings", essential as that work was, but Sir William had nearly carried the story up to date in the monumental twelve volumes of his *History*. No doubt there will be monographs in plenty in this age of "research", historical and otherwise, but the *History* will stand for generations. It is essentially the recognition of the fact that English law is not an ephemeral thing but an organic growth. Our law has a spirit of its own, or rather it has several spirits which haunt the corridors dedicated to the various "Divisions" that make up the High Court of Justice. With an era of legislative interference upon us we may be especially conscious of this ethos. In the land law with the threat of "prescribed forms" and "Rules made under the Act" ever growing in intensity we should be particularly grateful that the labours of Sir William have given us a yardstick by which to measure proposals for change. We ought not to be open to the charge of "conservatism" or being "reactionary" if we say that history proves over and over again that a law forced into another mould will fail commonly of its purpose. These views are, we think, a reflection of those shared with Holdsworth. Notwithstanding the magnitude of the work which he completed he never lost touch with

everyday life. Conveyancers must be conscious of historic rules of law being made to serve the purposes of modern life and lawyers are fortunate that the history of the law should have been written by an historian so conscious of the present.

Holdsworth was no remote scholar wrapt in the past but a kindly human figure, and we are the poorer for his passing. As lawyers we may be proud that his work received the recognition of the O.M., but many of us will carry with us a cherished memory of him as he was, always interested in the doings of lesser men and ready at all times with help and counsel.

Planning and requisition.—The threat or promise of land planning being held before our eyes it is worth while to notice things that happen now and are likely to form part of any planning. *Carltona Ltd. v. Commissioners of Works and Buildings*, [1943] 2 A. E. R. 560 arose out of a requisition of factory premises. The appellants manufactured certain foodstuffs. According to the learned Master of the Rolls the Government was in 1942 faced with a shortage of accommodation and man power. The Ministry of Food decided to withdraw supplies and the Ministry of Labour to withdraw labour. It was not decided and was not material whether these withdrawals were completed when the Ministry of Works served a notice of requisition under reg. 51 (1) of the Defence (General) Regulations. The notice stated that it had been decided “in the national interest” to take possession. The regulation refers to “the public safety, the defence of the realm or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community”. It was argued for the appellants that (a) the notice was bad in form, (b) the requisitioning authority never brought its mind to bear on the necessity for requisition, and (c) the circumstances were such that the requisitioning authority could not possibly have come to the conclusion they did had their mind been brought to bear on it. The Court of Appeal dismissed the appeal on all points.

First, there was no need to serve notice at all and, therefore, it was not material, but in any event the words “in the national interest” were clearly used in connection with the regulation and were comprehensive to cover all the grounds. Obviously the words “in the national interest” are very much wider than the words of the regulation. Whether a person, whose property is being seized, should be given the grounds on which it is to be taken is a matter of policy no doubt, but if such general notices are to be permitted in peace-time they are likely to prove very difficult for the owner to combat. It is a point which may well be worth watching in projected legislation and care be taken to see that it is not left to regulation which can be determined at the departmental will.

Secondly, although there was no evidence that the Commissioners of Works and Buildings or any of them had ever considered the matter that was immaterial, because the Assistant Secretary had considered the question. It was not necessary for him to consider which of the heads was the one for which requisition was required. As long as

he was satisfied that the land was required for some one or more of them he was entitled to make the requisition and he had considered the matter as far as was necessary.

In cases in which an appeal might lie against such an order it is obviously going to be much more difficult to satisfy the appellate tribunal that none of the grounds are applicable than to show that one or more are so. In most planning legislation there is some appeal from compulsory orders. It may be most important to insure that the grounds of the order are set out specifically.

Thirdly, the last argument was dismissed shortly on the ground that the regulation gave the competent authority the power to decide whether the requisition was necessary or expedient and consequently it was arbitrary. The only right of the Court to interfere exists where either (i) the power might not be within the four corners of the statutory authority, or (ii) it was not exercised *bona fide*. "Apart from that the Courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction": *per* Greene, M.R., at p. 564.

From the point of view of the Government Departments powers of this type are much more convenient than the restricted powers of compulsory purchase formerly conferred upon them. Administratively there is a great deal to be said for freeing the departments concerned from having to condescend too much to detail. In some of the rather grand schemes that have been forecast to particularise at the early stages may be difficult if not impossible. From the point of view of the private landowner there is of course another side to the picture. This may be illustrated from the decision in *Point of Ayr Colliery Co. v. Lloyd George*, [1943] 2 A. E. R. 546. Here a colliery undertaking was taken over by the Minister of Fuel and Power and it was held that the Court of Appeal could not entertain evidence to show that the Minister could not have had grounds for making the order that he did. The regulation conferred an arbitrary discretion which, however, must not be exercised *mala fide*.

It is likely to prove very difficult to frame planning legislation which does not give such arbitrary powers to Government Departments. On the other hand arbitrary discretions are contrary to the constitutional history of this country when exercisable over property rights. No doubt some compromise will be found, but the cases should not be overlooked. It should not be forgotten that an arbitrary discretion may be exercised for the benefit of the whole more readily than is possible to provide for fixed rights. The individual must be prepared to suffer for the community. But it is not easy for an administration really to weigh the pros and cons which are independent of paper considerations.

Registered land in non-compulsory areas.—Reverting to our note on the report of the Land Transfer Committee (*ante*, p. 62), we came across something that appears to be one of the "details" that could be improved with advantage. In the past there has been some discussion on the necessity for registering leases granted by a registered

proprietor of freeholds in a non-compulsory area. It has been suggested that a notice is sufficient, but it is thought that a consideration of sections 18 (1) (e), 19 (2), 69 (4), and 109 of the Land Registration Act, 1925, makes it clear that registration is necessary (see Brickdale, *Land Registration Act* (4th ed.), p. 43). Indeed, Sir John Stewart-Wallace suggests that a lease not so registered is invalid. The difficulty arises because a purchaser from a lessee in a non-compulsory area does not know that the land is registered and the lease was not created by a registered disposition. Indeed, this may be true of the lessee: cf. *White v. Bijou Mansions*, [1937] Ch. 610. On the other hand if every purchaser or lessee is to search the Index Map and Parcels Index whenever a lease for more than twenty-one years is granted, the Registry is likely to be faced with a serious problem. At the moment an official search is 5s. and requires a plan taken from the largest scale ordnance map: L. R. R. 286.

There seem to be two alternatives for adding to the many inconveniences arising from the rule that lessees do not inspect their lessor's title even in registered land. First, the need for registration should be abolished or made clear that it does not apply. This would involve increasing the list of overriding interests to include all leases and not merely terms for not exceeding twenty-one years. Secondly, every lessee should on the grant of a lease search the Index Map and Parcels Index and the official search should be attached. It will then be unnecessary to search again where the land is not registered at the date of the grant of the lease if a caution against first registration is also filed. Indeed, if the title was not registered at the date of grant the lease would probably be protected as an overriding interest, since the lessee would be in occupation or in receipt of the rents and profits: L. R. A., s. 70 (1) (g) and cf. L. R. A., s. 5 (1).

We cannot help feeling that such an unprecedented use of official searches of the Index Map and Parcels Index may cause some "heart"searching in the Registry. Nevertheless, it is probably as likely that there will be a lease not registered under the Land Registration Act as that there will be an undisclosed incumbrance on the Land Charges Register under the Land Charges Act—or, if not quite so likely, at least not so unlikely that it may not be negligent for having failed to search. The piecemeal system of adding registered land to the unregistered system is likely to provide a crop of such problems.

Mortgage by deposit and leases by mortgagor.—Attention may be called to a not dissimilar problem in connection with unregistered land which is adumbrated in Mr. Albery's article on p. 145. The peculiar position that the mortgagor may be able to oust the equitable mortgagee under the doctrine of *bona fide* purchaser without notice is a very curious result of the rule excluding the lessee from inspecting the leasehold title except under contract. If our learned contributor is right in his conclusions, and they are difficult to dispute, we can only think that this is another point that was overlooked in the drafting of the 1925 legislation. Indeed, we can only repeat that

wholesale interference without wholesale reconstruction of fundamentals must result in such peculiarities.

What is, perhaps, even more important, section 44 (5) of the Law of Property Act, 1925, would not seem to apply to exclude notice where, in fact, the title is inspected. Now it does not seem to be usual, where any considerable capital outlay is to be expended, for the intending lessee to forgo all investigation of title. Of course, if he finds the title deeds in the hands of a third party this would be evidence of a mortgage by deposit. On the other hand if there is no capital outlay the lease would be for the full annual value and the security would be little impaired. Nevertheless, these inelegancies, not to say inconsistencies, in the law require the attention of an amending Act so soon as Parliament can spare time from its present pressing preoccupations. Indeed, the time has come for the operation of the Acts to be reconsidered as a whole after their twenty years of working. This must not be taken to suggest that the 1925 Property Legislation has not proved effective in its major results, save perhaps for the essential problems of settled land, or that great learning and foresight were not displayed by its draftsmen. But the initial undertaking was so huge and from its character of amending substantive law through procedural reforms so inevitably piecemeal that some defects were bound to come to light in the course of its practice.

Registered land—restrictive covenants.—Attention should be drawn to the note in the Law Society's Gazette concerning restrictive covenants entered on the register (Gazette for February, 1944, p. 26). The Land Registry, owing to shortage of staff due to war conditions, have given up the practice of entering the covenants in full and have referred to the instruments containing the covenants: L. R. A., s. 50; L. R. R. 212. The Council draws attention to the fact that photographic copies of deeds referred to in the Register can be obtained for a minimum charge of 3s. for an office copy deed and 2s. for an office copy of a plan.

These office copies have the advantage that they are as sufficient evidence as the Land Certificate itself and, consequently, avoid the necessity of inspecting the Register.

The same practice may be used in connection with easements. As overriding interests they do not need to be noted on the Register. As is pointed out in the Gazette the practice is for simple easements such as ways to be noted shortly on the Register but not copied. More complicated easements are either noted *verbatim* or omitted. The vendor is required to provide a proper abstract of these rights under the Land Registration Act, s. 110, unless the contract otherwise provides. It is submitted that a short note which is not *verbatim* is scarcely a proper abstract since the exact wording of the grant is material.

Conveyancing costs.—At a recent meeting of the Law Society the President announced that the scales for costs in registered and

unregistered conveyancing had been increased by $12\frac{1}{2}$ per cent. This increase was designed to cover the increase in the overhead expenses. In view of the serious increase of the cost of living there seems to be no need to excuse a rise in the actual remuneration of solicitors independently of their overhead charges. Indeed, the only ground for refusing to increase their rate of remuneration would be that the rise in values of property, if such a rise exists as it undoubtedly does in respect of some property, automatically increases the normal remuneration of solicitors. How this reflects a satisfactory state of affairs it is not for us to say.

Dealings prior to first registration.—In the Law Society's Gazette for January, 1944, attention is drawn to Land Registration Rule 72, which enables dealings prior to first registration by a person entitled to be registered to take a form analogous to that of registered dealings. The value of the rule exists where subsequently to a purchase the land will be registered. The importance of the rule lies primarily in the cases falling in compulsory areas. The use of the prescribed forms of transfer may be simpler than an ordinary conveyance: see Form II in *Key & Elphinstone's Precedents* (14th ed.), vol. iii, p. 422.

It should, however, be emphasised that a purchaser should only resort to this practice where he is not entitled to require the vendor to register his title and not be persuaded to adopt it to avoid delay where the vendor has failed to do so. The reason for this primarily lies in the doubtful position of a person having a title under a transaction that should have been registered: see *L. R. A.*, s. 109. But there is another very sufficient reason. It seems quite clear from the decisions in *Chowood v. Lyall*, [1930] 2 Ch. 156, and *Re Chowood*, [1933] 1 Ch. 574, that the position of a first registered proprietor, even with an absolute title, is less advantageous than that of a transferee for value from such a proprietor. The State guarantee of title, to use a rather loose description, conferred by sections 84 and 85, does not afford much protection to a first registered proprietor. This is not a criticism of the Act, because there is no particular reason why the State should indemnify a first registered proprietor for a defect in his title, but it is a good reason for purchasers seeking always to be in the position of transferees from a registered proprietor.

Investigation of title, new and old.—For conveyancers who have wrestled with the problems of title which have arisen from the 1925 Legislation or who regard with some dismay the necessity of mastering yet another huge branch of land law under the heading of registered land, we would offer the solace of the lines appearing hereafter relating to fifteenth century titles. While it may be still material that a vendor be of "good minde and memory", at least we are no longer concerned with whether he be "bond or free". Indeed, are we not

fighting that it should be so? Probably, too, covenants for title are a good exchange for "warrantys", and the profession as well as the landowner is indebted to the royalist Parliament that stood firm on the question of 12 Car. II, c. 24 (Statute for the Abolition of Military Tenures). We think that a perusal of these lines will show that we have some compensations for the present rigours of the law.

LEGAL ADVICE TO PURCHASERS OF LAND.

By SIR JOHN FORTESCUE,

Lord Chancellor to King Henry VI.

(From Rawlinson MSS (Bodleian), B. cclii.)

Who will beware in purchasing
 Consider the poyntis that byn following:
 First see that the lond bee cleere in title of the seller,
 See that he not in prison bee,
 And that he bee in good minde and memory;
 And that hit stand not in no danger,
 And of no woman's endower;
 See whether the tenure bee bond or free,
 And have reles of every feffe;
 See that the seller be of age,
 And that hit bye in noe morgage;
 Loke yef a taile thereof may be found,
 And whether it stand in statutes bond;
 Consider what service longeth thereto,
 And what quyte rent present must goo;
 And if hit meoue of weddid woman,
 Thinke on couert de Baron then;
 And yef thou might in any wyse
 Make the charter with waramit tys,
 To their heires and assignes also,
 This shall a wise purchaser doo.
 In fifteen yeeres yef thou wise be,
 Thou shalt agayn thy money see.

(Reprinted from Lord Clermont's Collection of Fortescue's Works.)

TWENTY YEARS' TITLE.

By E. O. WALFORD, LL.D., Solicitor.

There has been a growing tendency, encouraged by the *tempo* produced by modern conditions, for conveyancers to treat a twenty years' title as "good enough for practical purposes". I have heard it stated that "a twenty years' title is generally accepted nowadays". One must admit that there must be few titles which are likely to be disturbed after enjoyment of the land for upwards of twenty years under a title commencing with a conveyance on sale or first mortgage at least twenty years old reciting that the vendor or mortgagor was

seised in fee simple in possession free from incumbrances. Nevertheless, the purchaser who has agreed to accept less than the statutory title is necessarily saddled with notice of everything which he would have discovered if the full statutory title had been deduced: *Re Nisbet and Pott*, [1906] 1 Ch. 386; and see *Williams on Vendor and Purchaser* (4th ed.), vol. i, p. 250. On the other hand, by virtue of section 44 (8) of the Law of Property Act, 1925, a purchaser who insists on the full statutory title is not affected with notice of equitable incumbrances prior to the root of title. Accordingly, a purchaser who agrees to accept a short title will not be saddled with notice of any equitable incumbrance which would not have been apparent if the full statutory title had been deduced: *Carter v. Williams* (1870), L. R. 9 Eq. 678; *Wilkes v. Spooner*, [1911] 2 K. B., at p. 484.

A REMINDER.

Whatever may be the general practice at the present day, it is thought that the twenty years title school will experience a reduction of members following the recent decision of the late Mr. Justice Bennett to which I will refer more fully later. As it concerned the exercise of a power a few observations on powers may be appropriate. One can be fairly sure that statements in *Williams on Vendor and Purchaser* are reliable, so I will venture to repeat the words of that work: "A deed appointing an estate under a power of appointment is not a good root of title; since to have a power of appointment over an estate is not the same as to be the owner of it, (for such a power is in truth only a delegation of the owner's powers of disposition), and what a vendor has to prove is the full ownership, at the time of commencement of title, of the estate he is selling. For evidence of such ownership he must go back to the deed which created the power" (4th ed., vol. i, p. 126). In a footnote the learned editors cite old authorities, and proceed to explain the effect of section 45 (1) of the L. P. A., 1925, which prevents a purchaser from requiring the production or an abstract or copy of any document prior in date to the root of title even though such document creates a power *subsequently* exercised by an abstracted document. That sub-section must, however, be read with section 45 (11), which provides (in effect) that section 45 (1) is to take effect merely as if it were inserted as a contractual stipulation, and the vendor is not to be entitled to specific performance if he would not have been entitled to an order for specific performance on the footing that the negation of his right was contractual and not statutory. Therefore, room is left for the operation of the old case law. Now, according to *Re Marsh and Earl Granville* (1882), 24 Ch. D. 11, a vendor cannot enforce specific performance of his contract if he has cut down the period for deducing title unless the root of title which he discloses is a good root, or he has expressly disclosed the nature of the defect. It is well settled that a deed exercising a power of appointment is not a good root of title. Hence, the purchaser is entitled, in proceedings for specific performance, to set up the plea that it has not been shown that the power was properly exercised, and that the deed conferring the power has not been abstracted.

UNLIMITED POWER OF SALE.

We may now turn to the recent decision of Bennett, J. It should be explained that it was not a case in which a power of *appointment* was exercised, or in which a twenty years' title was accepted by the purchaser. The point to be made in that connection arises incidentally. The title was to commence with a conveyance to T. W., dated May 15, 1824, and the purchasers were required to assume that at his death in 1875 T. W. was seised in fee simple free from incumbrances, and were not to raise any requisition or objection as to the intermediate title. By his will T. W. had given his trustees power *at any time* to sell his estate. Of course, if such a power were interpreted literally it would have infringed the perpetuity rule, and would have been void. It has, however, been established by certain decisions that powers of this kind are to be construed as if they were limited to the period prior to the vesting in remainder or reversion of the fee simple under the trusts of the will or settlement by which the power is conferred, and *possibly* within a reasonable time thereafter: *Re Cotton's Trustees* (1882), 19 Ch. D. 624; *Re Sudeley (Lord)*, [1894] 1 Ch. 334.

TWENTY YEARS AFTER.

In the case before Bennett, J., *Re W. and R. Holmes*, [1943] 2 A. E. R. 716, the power was not exercised until 1922, nearly forty-seven years after the death of the testator, T. W., whose will contained the power above mentioned. The purchaser was buying in 1943 from the vendor, who had taken his conveyance from the trustees no less than twenty-one years previously. The purchaser, by requisition, required the vendor to abstract the beneficial trusts of the will and to show that the power was still exercisable in 1922. The vendor contended that as the power had been exercised over twenty years ago and its exercise had remained unchallenged for that period, it should be assumed that the power had been validly exercised; but in vain, for Bennett, J., held that the purchaser was not bound to take the risk. He decided, accordingly, that a good title had not been shown, and ordered that the deposit be returned to the purchaser.

COMPARISON.

It would not appear to be entirely clear whether the rule concerning the deduction of title is that the *parties (or party) conveying* should, on the face of the deed forming the root of title, be parties (or a party) capable of conveying and who convey the fee simple in possession free from incumbrances to the grantee by that deed, or whether it must merely be shown that on the face of the "root" deed the property was conveyed to the grantee in fee simple. It appears, however, that the former is the better opinion. The isolated statement in *Williams on Vendor and Purchaser* (at p. 127) that the root must be of such a nature that "the purchaser is entitled to assume that the deed was made on an occasion on which the title would be investigated" does not appear to be intended to be inclusive of all conditions governing the question. Otherwise, the remarks on the same work (as set out above) concerning powers of appointment

would be inexplicable. Moreover, on the same page it is observed that conditions cutting down the statutory title, "to be effectual as regards the specific performance of the contract, must state clearly the nature of the instrument with which the title is to commence" (p. 127) (a). It does not seem possible to take an effective distinction between a root of title which depends for its validity upon the operation of a power of appointment, and one which depends for its validity upon the exercise of a power of sale.

TWO MORALS.

Two morals may be drawn from this recent case: (1) That where the title which is offered commences with a deed which does not show that the *grantor* was seised in fee simple in possession free from incumbrances the exact circumstances should be stated, and the right to make requisitions or objections in respect of those circumstances should be expressly excluded. (2) That a twenty years' title should not be too readily accepted; and that where such a title is offered as the best available title it should be ascertained whether the grantor under the "root" deed was seised in fee simple in possession free from incumbrances. The present writer has for many years past recommended the practice, when revising a draft contract for the purchase of a freehold property, of adding to the usual statement that "the title shall commence with a Conveyance on Sale dated the — day of — and made between A of the one part and B of the other part" the following words: "The said A was at the date of the said Conveyance seised beneficially in possession in fee simple free from incumbrances of the property hereby agreed to be sold" with a marginal inquiry: "Please state what information in this respect is given by the recitals". By this means the exact nature of the root deed can generally be ascertained. It is better, in practice, to ascertain the true facts before contract. It is too often forgotten that the vendor can normally escape trouble by serving notice of rescission. A willing and anxious purchaser is often annoyed by delay arising out of requisitions, and is even more annoyed when told that it is impossible to force the vendor to incur substantial expense in putting his title in order, and that the only outcome of the delay and insistence upon the requisition may be that the vendor will give notice that if the requisition is not withdrawn the contract must be treated as rescinded. Such annoyance is justifiable. It was pointed out, I think, by Mr. Cyprian Williams, in the introduction to his work *Contract of Sale of Land*, that such a right of rescission is anomalous, and it is certain that a party to a commercial contract who attempted to introduce such a rescission clause into the contract would meet with considerable resistance. Nevertheless, it is probable that whilst land law remains as complex as it now is, such a rescission

(a) It may be worth noting that on the same page the view is expressed that a voluntary conveyance at least thirty years old is a good root of title; but in *Dart on Vendor and Purchaser* (7th ed., p. 333) the contrary view is expressed. In a footnote (p. 127, note (s)) Williams submits that the decision relied upon by Dart (*Re Marsh and Earl Granville*, *supra*) has no application where the purchaser's rights are not curtailed by special stipulation.

clause will continue to be inserted in general or special conditions, as an avenue of escape for a vendor who finds that his title is not so satisfactory as he had supposed.

OPTIONS TO PURCHASE AND STATUTORY POWERS.

By E. H. BODKIN, Barrister-at-Law.

The recent decision in *Re Armstrong's Will Trusts, Graham v. Armstrong*, [1943] W. N. 209; [1943] 2 A. E. R. 537, has done something to remedy the uncertainty and frequent unfairness of the position of beneficiaries to whom options to purchase land have been given by will. But it remains the law that an ordinary testamentary option cannot, where the land is subject to a settlement for the purposes of the Settled Land Act or the statutory trusts, be conferred in any form which will insure that the donee gets the thing which the testator intended that he should have, *viz.*, the land itself.

The avoidance of such options, so far as they conflict with the statutory powers, has always been liable to occur under the Settled Land Acts; though section 106 of the Settled Land Act, 1925, is somewhat wider than the corresponding provision of the Act of 1882 and extends not only to tenants for life and persons having the powers of a tenant for life, but also to statutory owners. These provisions are, or should be, well known to those engaged in drafting wills, and perhaps do not go further than is required for safeguarding the object of the Settled Land Acts, which has been said to be to make settled land saleable. But why the Legislature should have thought it necessary to interfere with the carrying out of the ordinary trusts of a will when the property has become subject to the statutory trusts, it is difficult to see; and Astbury, J., in *Re Flint, Flint v. Flint*, [1927] 1 Ch. 570, 578, said it was not in his province to conjecture. It would appear to have been no greater hardship to require a purchaser to ascertain whether the donee had waived his rights than to ascertain whether a person whose consent to a sale under an express trust for sale was required had given it; and there can be no reason other than the simplification of conveyancing machinery to enlarge the rights of the owners of the undivided shares. The Statutory Trusts were the creation of the 1925 legislation and could not have been anticipated by testators who made their wills previously. They may also be imposed where the testator died after 1925, *e.g.*, under section 34 of the Law of Property Act, 1925, by reason of a devise to tenants in common; and even now testators may well overlook the possibility of their intentions being defeated by them.

In most respects the 1925 legislation has been very solicitous to preserve the rights of the owners of all equitable interests in the land. This intention is evidenced by the general provision in Part I of the First Schedule to the Law of Property Act, 1925, which prefaces the Transitional Provisions and provides that all estates, interests and charges in or over land which before the Act were subsisting at law or capable of taking effect as legal estates, but which by virtue of

Part I of the Act are not capable of taking effect as such, were to be converted into equitable interests and should not fail by reason of being converted into interests in the land or the proceeds of sale thereof. A specific instance is to be found in the provisions preserving the rights of mortgagees of undivided shares in section 102 of the Law of Property Act, 1925. The conversion of an estate tail in an undivided share in land into an absolute interest in the proceeds of sale which was held to occur in *Re Price*, [1928] Ch. 579, was corrected by the Law of Property (Entailed Interests) Act, 1932, and the interests of the issue in tail preserved.

The position of the donee of a right of pre-emption given by the will of a testator who died in 1926 was considered in *Re Flint*, *supra*. The land in question was on January 1, 1926, held in trust during the life of the testator's widow to pay her an annuity and to divide the residue of the income between his children or their issue in certain shares; after the death of the survivor of his children it was to be held on trust for sale. It was therefore settled land held in undivided shares vested in possession, and accordingly under the Transitional Provisions of the Law of Property Act, 1925, it vested in the trustees of the will on the statutory trusts. The trustees were given an express power of sale; but the testator declared that before selling the property it should first be offered to his son Alfred at a price to be fixed by the trustees' valuer, and if he would give such price he might purchase notwithstanding he was a trustee. He also declared that Alfred could purchase the property by auction or private treaty.

It was held that Alfred was not entitled to require the trustees before executing the statutory trust for sale to offer the property to him. *Prima facie* the right of pre-emption was limited to a sale under the power or trust in the will and did not attach to a sale under the statutory trusts. But even if the right was intended to apply to any sale by the trustees the result was the same.

Astbury, J.'s reasoning was as follows. The right of pre-emption could not have interfered with the exercise of the life tenants' powers under the old Settled Land Act, which would have defeated it. The statutory trusts required the proceeds of sale to be held upon the trusts and subject to the powers and provisions "requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance was not secured by a legal mortgage) interested in the land". *Prima facie* this direction was absolute and complete and it was difficult to see how the direction could apply to a person with a mere right of pre-emption unless there was something else in the statute giving effect to such right. Under section 2 (1) of the Law of Property Act, 1925, a conveyance to a purchaser of a legal estate was to overreach any equitable interest or power if capable of being overreached. The right of pre-emption was not saved as being an additional or larger power conferred on the trustees which attached to the statutory trusts and was exercisable by the trustees under section 28 (1) of the Law of Property Act, 1925, as amended. Nor was Alfred entitled under section 3 (1) (b) to have a legal estate vested in him in priority to the statutory trusts; his right was not even paramount to the power or trust for sale in the will. Nor was he entitled to require a legal estate to be vested in him under section 3 (3)

which applied to a wholly different class of case. Section 35 was to be read subject to section 3 which provided generally for the enforcement of equitable interests against the estate owner, but only as regards equitable interests expressly given priority by the latter section. The right was not an incumbrance, and it could not be satisfied out of the proceeds of sale; therefore it was overridden by the statutory trusts.

In *Re Armstrong's Will Trusts, supra*, the testator gave his wife a life estate in certain land which after her death was to fall into residue and be held on trust for sale. He also gave his son an option to purchase the same land for £5,000, exercisable within twelve months after her death. The widow had during her life sold the land under her Settled Land Act powers; she was now dead, and the question to be determined was whether the son was entitled to exercise his option against the proceeds.

Cohen, J., said the case was not covered by *Re Flint, supra*. The option was not in that case to purchase for a fixed price, but to receive the first offer when the trustees decided to sell, and it was not the testator's intention to confer a bounty on the beneficiary by fixing the price; further his rights in the proceeds of sale were not determined. It was not true to say that in the present case on construction the option was intended to extend only to the land in its original form, and that the testator had in mind the powers of a tenant for life and deliberately exposed his son to the risk that their exercise might defeat his option. He intended that (subject to the widow's life interest) any benefit accruing from the land over and above the £5,000 should enure to the son's benefit. His Lordship referred to the cases of *Re Cant's Estate*, 4 De G. & J. 503, where the donee was held entitled to exercise his option against the purchase money of lands compulsorily acquired after the testator's death; and to *Re Kerry*, [1889] W. N. 3, where the land had been sold in a creditors' administration action and the option was held effective as against the proceeds of sale in Court. The proceeds of sale were capital money within section 75 (5) of the Settled Land Act, 1925, and had to be held for and go to the same persons successively in the same manner and for and on the same interests and trusts as the land, if not disposed of, would have been held and gone under the settlement. The son's interest was an interest in land within the section; but in any event the trustees were bound to hold the capital moneys on the same trusts as the land, *i.e.*, on trust to sell and convert them, but to sell them to the son if he signified his desire to purchase them. The son's right to take the land was no doubt overridden by the exercise of the tenant for life's powers, but there was no reason why that exercise should prevent his right attaching to the proceeds of sale.

The option in the above case, it is to be noted, was not exercisable until the settlement had come to an end and might therefore have taken effect in regard to the land itself if it had remained unsold. But provisions preventing or tending to induce the tenant for life not to exercise his powers are only avoided by section 106 of the Settled Land Act in so far as they have that effect; and an option in terms referring to the land which cannot in any event have effect in relation to such land would be regarded as severable, and valid so far as regards the proceeds of sale, provided an intention to that effect could be presumed. When the option is to purchase at a fixed price the presumption is

that the testator intends the donee to have the benefit of any excess over and above the value of the land. The option is in fact "a benefit translatable into terms of £ s. d.", to adopt the words of Luxmoore, L.J., when dealing with the assignability of such an option in *Re Sykes, Younghouse v. Sykes*, [1941] Ch. 1; affirmed *sub nom. Skelton v. Younghouse*, [1942] A. C. 571. This appears to be so whether the value of the property exceeds the fixed price at the date of the will or appreciates subsequently. (It does not appear from the report which had happened in *Re Armstrong's Will Trusts, supra*). The only way in which this intention can be given effect to if section 106 applies is to construe the option as referring to the proceeds of sale; and if the testator is to be presumed to have known of the statutory powers an intention to this effect will be inferred. But when the testator confers an option or right of pre-emption at a valuation or otherwise, this intention obviously cannot be presumed. And when the testator shows a clear intention that the option is to relate only to the land, or it can be inferred from the circumstances that it was given because of the special value of the land to the donee, the result might be the same, even if the option were for a fixed sum.

The option, whatever its form, would, however, be unenforceable as against the land. If it be for a fixed price it will clearly be a fetter on the Settled Land Act powers. Even if it be a right to purchase at a valuation or agreed price, or a mere right of pre-emption when the trustees decide to sell, the result would be the same; it will restrict the tenant for life from selling by auction (see *Re Flint, supra*; *Re House, Westminster Bank v. Everett*, [1929] 2 Ch. 166). In *Re Armstrong's Will Trusts, supra*, the option, not being exercisable until the tenant for life's death, was, if and so far as it affected the land, if strictly construed, an absolute prohibition against selling.

The same result may be arrived at by a similar line of reasoning to that in *Re Flint, viz.*, that there is no provision in the Settled Land Act, 1925, or the Transitional Provisions preserving the option as against a sale by the estate owner. The general provision for the enforcement of equitable interests against the estate owner of settled land is to be found in section 16 (1) of the Settled Land Act, 1925. This provides that he is to stand possessed of the land upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the equitable interests and powers affecting the settled land, or the income thereof, of which he has notice, according to their respective priorities. This corresponds to section 3 (1) (b) of the Law of Property Act, 1925, in relation to trusts for sale; and there are also in section 16 (1) (ii) of the Settled Land Act similar provisions to those in section 3 of the Law of Property Act conferring on a person who becomes entitled to have a legal estate vested in him in priority to the settlement by reason of a right of reverter, or an equitable right of entry taking effect, or on the ground that his interest ought no longer to be capable of being overreached under the Settled Land Act powers, a right to have such estate conveyed to him. These provisions, however, do not go any further in this respect than those considered in *Re Flint, supra*, and do not, as appears from that case, apply to an option, nor give the donee any right to a transfer of the legal estate from the trustees. An option would not be a legal estate

having priority to the settlement within section 72 of the Settled Land Act; options affecting a legal estate are expressly converted into equitable interests by section 186 of the Law of Property Act; nor is it a right capable of being protected by registration under the Land Charges Act, 1925; though if it had been an option created *inter vivos* it might have been. The other interests incapable of being overreached under section 72 of the Settled Land Act correspond to those in section 2 (3) of the Law of Property Act, which does not apply to conveyances under the Settled Land Act. There is, it is true, no general provision corresponding to section 2 (2) of the Law of Property Act (as amended) which provides that a conveyance by trustees for sale satisfying the conditions there laid down operates to overreach any equitable interest or power having priority to the trust for sale (other than those expressly preserved) and that such interest shall take effect as if created or arising by means of a primary trust affecting the proceeds of sale, but the same result is effected by sections 72 and 75. As an equitable interest, an option will equally be overridden whether having priority to the settlement or arising thereunder. It follows therefore from the reasoning in *Re Flint*, *supra*, that the option could not affect a sale under the Settled Land Act powers. It is, however, to be observed that an option, like the other rights incapable of being overridden, is a right not capable of being estimated in money; the Legislature is throughout careful to preserve such rights as against a purchaser.

The position when the property the subject of the option is held on the statutory trusts appears to be analogous. The rights of the donee, if and so far as they are intended to affect the proceeds of sale, will be given effect to under section 35 of the Law of Property Act as being the rights of a person interested in the land; in *Re Flint*, *supra*, the rights were obviously not so intended. This is in accordance with the view expressed in *Wolstenholme & Cherry's Conveyancing Statutes* (12th ed.) Vol. I, p. 246, that the principle of *Re Flint*, *supra*, only operates in favour of a purchaser and does not affect the beneficial interests. Such an intention can readily be implied when the will was made, or perhaps if the testator died, after 1925 and the statutory trusts are imposed subsequently, *e.g.*, under section 34 of the Law of Property Act or section 36 of the Settled Land Act. But when the will was made prior to 1926 it is difficult to infer the same intention, except perhaps when the land was settled land under the old law. The testator could not have had in mind any possible invalidity by reason of the statutory trusts; and there were then no statutory provisions in force which could have defeated the option. It must therefore be considered to apply to a sale under the powers conferred expressly or by implication by the will, or to a sale by the tenants in common in right of their estates.

The option cannot, however, be enforced against a sale by the trustees under the statutory trusts. This was expressly decided in *Re Flint*, *supra*, in regard to settled land held on the statutory trusts, on the ground that such a right was neither protected as paramount to the statutory trusts nor capable of being satisfied out of the proceeds of sale thereunder. The position is the same in cases falling within the other paragraphs of Part IV of the First Schedule to the

Law of Property Act, 1926, as the option is not an incumbrance secured by a legal term of years absolute; such an incumbrance is not, it is true, expressly mentioned in paragraph (2), but the position is the same under section 35. It makes no difference that the option is by the will given priority over the undivided shares; it will in any case be overridden by a conveyance by the trustees under section 3. Nor is it the case, as was argued in *Re Flint, supra*, that the trustees are under an obligation to give effect to the option, though it will be overridden under the above section by a conveyance to a purchaser for value of the legal estate. Nor again is the consent of the donee required under paragraph 1 (9) of Part IV of the First Schedule when the statutory trust for sale is exercised, as he is not an "incumbrancer" within the meaning of that paragraph.

The same result can be reached on slightly different grounds. The statutory trust for sale is an overriding trust. Though section 106 of the Settled Land Act does not directly apply, any provision which would wholly or partially defeat that trust is void. (See *Bernhardt v. Galsworthy*, [1929] 1 Ch. 549; *Re Thomas, Thomas v. Thompson*, [1930] 1 Ch. 194, where an express power to partition was held inconsistent with the statutory power for that purpose in section 28 of the Law of Property Act, 1925; cf. *Re Davies' Will Trusts, Beavan v. Williams*, [1932] 1 Ch. 530.) This applies in all cases where the statutory trusts are imposed, and not only when there would have been a settlement for the purposes of the old Settled Land Acts.

It seems fairly clear on the authorities that an option to purchase land for a fixed price, which is the only kind which is likely to be presumed to extend to the proceeds of sale, creates an interest in the land, whether it be exercisable presently or in the future. (See the judgment of Jessel M.R. in *London and South Western Ry. v. Gomm*, 20 Ch. D., at pp. 583, 584.) Cohen, J., took the same view on the authority of this case in *Re Armstrong's Will Trusts, supra*, but did not find it necessary to decide the point, as he held that in any case the option must be given effect to on the ground that the proceeds of sale must, under section 75 (5) of the Settled Land Act, 1925, be held on the same trusts as the land from which they arose would have been held under the settlement. An option of the above nature seems equally to be capable of being given effect to out of the proceeds of sale under section 35 of the Law of Property Act. There is nothing in *Re Flint, supra*, inconsistent with this view. It is unnecessary to consider rights of pre-emption, or such rights as the "first refusal" of land which was considered in *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 57, to be merely personal, as these could obviously never be intended to apply to the proceeds of sale at all.

The same considerations apply to a conveyance by personal representatives. Under section 33 of the Law of Property Act, 1925, and section 33 of the Administration of Estates Act, 1925, the personal representatives of an intestate have all the statutory powers of trustees for sale. Similarly the personal representatives of a person who dies testate or intestate have for purposes of administration under section 39 of the latter Act all the powers conferred by law on trustees

holding land upon an effectual trust for sale, including power to overreach equitable interests.

The above considerations do not apply when the land is subject to an express trust for sale, and when this is imposed by the will an option in the ordinary form will be completely effective. Undivided shares in land can only take effect behind a trust for sale, which should in such cases be expressed. If, however, it is desired to create a settlement for the purposes of the settled land and take the risk of the option failing in regard to the land, a clause may be inserted to the following effect:—

“Provided that if and so far as the option hereinbefore conferred may be avoided in regard to the said property itself as conflicting with any statutory power or tending to prevent the estate owner for the time being from exercising or inducing him not to exercise such power the said option shall provided the whole of the said property shall be sold at one time (whether as a whole or in lots) (a) take effect and be exercisable as against the net proceeds of sale thereof or the investments or other property for the time being representing the same.”

An option to purchase created *inter vivos* cannot in any case be overreached either under the statutory trusts or the Settled Land Act powers, provided it is registered as a land charge, or, if created prior to 1926 and not assigned subsequently, the purchaser has notice of it. Such an option will not only be binding on a purchaser, but the trustees will also be responsible to the donee for giving effect thereto. Even if the option were void as against a purchaser for non-registration the Court would not, it seems, order execution of the statutory trusts without reference to the option on the application of a co-owner who had concurred in granting such an option in relation to the entirety of the land (see *Re Buchanan-Wollaston's Conveyance*, *Curtis v. Buchanan-Wollaston*, [1939] 1 Ch. 217). It is arguable that a testamentary option is a “general equitable charge” and consequently is a land charge of Class E; but even if this be so, registration would not be any protection to the donee's rights against the land, as the option could be overreached under section 2 (3) of the Law of Property Act or section 72 (3) of the Settled Land Act, as the case may be.

FOUL DEEDS.

BY MICHAEL ALBERY.

What one's bank manager chiefly wants is the deeds. It is only as a rule after they have been safely deposited in his strong room with an appropriate memorandum of charge that the flint in his heart may be mollified. This may have been all very well before January 1,

(a) In *Re Armstrong's Will Trusts*, *supra*, part of the land only had been sold, but the question of apportioning the money payable under the option was not argued. The difficulty of providing for apportionment by the will would usually be insuperable, from possible variations in value alone.

1926. But it is the purpose of this article to suggest that in England and Wales it is no longer so well to-day. The Law of Property Act, 1925, has altered all that in a manner not apparently appreciated by bank managers as a class. Nowadays when that man of sorrows, an intending mortgagor, approaches his local manager with proposals for an advance on the security of real estate, the up-to-date manager will of course make due examination of the title deeds of the property, but he will do so, not greedily as of old, but gingerly, as one handling a Rylands and Fletcher object; and above all he will make very, very sure that they do not find their way into his strong room. On the contrary he will hurl them, if necessary, at the retreating head of the mortgagor as he goes out of the door.

Let us consider a concrete example. A purchases freehold property for £100,000. He deposits the deeds of the property with B as security for an advance of £75,000. He then grants a long lease of the property to C at a nominal ground rent, taking a fine of perhaps £40,000, and not of course disclosing that the property is mortgaged. He then—let us also suppose it is peacetime and that his passport is in order—he then takes the next aeroplane to America, where we will leave him.

No interest is paid on the mortgage, and in due course the whole horrid history comes to light. B desires to realise his security. But he can only do so subject to the lease, so that he makes a very handsome loss. C is a purchaser of a legal estate for value without notice of a prior equity. See section 44 of the Law of Property Act, 1925, which provides by sub-section (2) that under a contract to grant a term of years the intended lessee shall not be entitled to call for the title to the freehold, and by sub-section (5) that where by reason of any of the three last preceding sub-sections an intending lessee is not entitled to call for the title to the freehold, he shall not after the commencement of the Act be deemed to be affected with notice of any matter of which, if he had contracted that such title should be furnished, he might have had notice. See also section 199 (1) (ii) of the above Act.

The trouble of course is due to section 44 (5), a new provision abolishing the doctrine established by *Patman v. Harland* (1881), 17 Ch. D. 353, and with it certain hardships no doubt, but evoking other hardships in their stead. There is indeed a general provision in section 13 of the Act that the Act shall not prejudicially affect the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land. It is submitted, however, with some confidence that the only effect of section 13 is to preserve the general incidents of mortgages by deposit, but that it does not guarantee that they shall be in all circumstances as efficacious as before. Cf. the comparable construction of section 53 of the Administration of Estates Act, 1925, in *Re Anstead*, [1943] Ch. 161.

So much for the manager who knows no better than to snatch at the deeds. But suppose he is wise in his generation. Suppose he secures the execution of an equitable charge, but firmly returns the deeds to the mortgagor. Not possessing the deeds he is now in a position to register the equitable charge as a Class C (iii) land charge.

Once more the same horrid history comes to light. But this time it is the lessee who is discomfited. Section 198 (1) of the Law of Property Act, 1925, provides that the registration of any matter under the Land Charges Act, 1925, shall be deemed to constitute actual notice of such matter to all persons and for all purposes connected with the land affected. It is true that the unfortunate lessee had no means of knowing against whom to search, since he had no right to call for the freehold title. But it is apprehended that section 44 (5) of the Act will not save him against the very strong wording of section 198 (1). This at any rate seems to be the view to which Simonds, J., inclined without having to decide the point in *White v. Bijou Mansions, Ltd.*, [1937] Ch. 610, at p. 619. The lease will therefore be voidable by the bank since it infringes the provisions of section 99 (6) of the Act by reserving less than a rack rent and being in consideration of a fine.

It is not of course open to the manager who has taken a deposit of the deeds to obtain the advantages conferred by the above sections. See section 10 of the Land Charges Act, 1925, and section 198 (2) of the Law of Property Act, 1925. Is it perhaps too fanciful then to imagine him murmuring with Hamlet, as he rummages in his vaults :

“Foul deeds will rise,

Though all the earth o’erwhelm them, to men’s eyes.”

If the above argument is correct, then it is respectfully submitted that it presents an anomalous position, almost certainly not contemplated by the Legislature, and perhaps one day when there is leisure again for these matters in need of revision by further statutory enactment. Meanwhile current practice in the manner of effecting equitable mortgages of real estate would appear to be worth reconsideration. The moral for the time being appears to be “*Caveant argentarii*”.

STRICT SETTLEMENT AND TRUST FOR SALE.

One of the effects of the Property Legislation of 1925, which may not have been meant but might have been anticipated, is the large number of unintended settlements for the purposes of the Settled Land Act. In a general way we may say that this frequently involves appointment of new trustees and the execution of special documents in the form of vesting instruments. By reason of the decision in *Re Duce and Boot’s Contract*, [1937] Ch. 642, even the protection of section 36 (7) of the Administration of Estates Act, 1925, does not save all the many cases of accidental settled land settlements from having to comply with these provisions.

Unfortunately all conveyancers are aware that sometimes the appropriate instrument by way of appointment of new trustees or a vesting instrument has not been executed prior to a purported transfer of the legal estate and the title then becomes difficult and occasionally expensive to put straight. Not that there is anything peculiarly effective in the Settled Land Act method, but by virtue of

section 13 of the Settled Land Act, 1925, the Act must, save in rare cases, be complied with in order to pass the legal estate. What value inheres in the scheme provided by the Act is not very apparent except in the shortening of the Abstract of Title—it is submitted that the law is not simplified and probably mistakes are at least as easy to make and as frequently made. Essentially we have altered the position from legal estates passing by operation of law to legal estates passing by the effect of certain instruments which must comply with prescribed formulas. The gain lies in the essential simplicity of the document creating the settlement or resettling the land. One might almost say that we have put a premium on ignorance. The effect of the complications arising from the necessity for a series of technical documents, and there can be no denying that they are of everyday importance, has resulted in a call by a number of distinguished conveyancers for the abolition of the strict or settled land settlement altogether. In their view the results intended to be obtained by the operation of section 110 of the Settled Land Act which (in conjunction with the prescribed requirements of the instruments creating the settlement) almost eliminates the doctrine of notice from the purview of the settled land settlement are in fact obtained in trusts for sale with much greater simplicity and without complications that arise under the Settled Land Act. In order to achieve this object it would seem inevitable that the number of statutory trusts for sale would have to be increased and finding the appropriate trustees would not necessarily avoid mistakes analogous to those which occur from the accidental settlement. Furthermore, it is thought that the effect of statutory trusts for sale on beneficial interests under the trust (see *Re Flint*, [1927] 1 Ch. 570 and other cases) should be much modified in order to prevent the unnecessary defeat of the donor's intentions. But it must be conceded that in the matter of form there is a certain simplicity about the trust for sale, so far as it concerns the legal estate, which is now manifestly absent from the settlement of the legal estate under the Settled Land Act, 1925. On the technical side of the law neither are peculiarly simple as may be illustrated from the rules governing their determination.

It seems clear that the framers of the Settled Land Act contemplated that a settlement would normally come to an end by a deed of discharge under section 17 of the Act. Perhaps for good reasons they seem not to have had the courage of their convictions and settlements may come to an end in other ways, but a comparison of the decision in *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, and the much less well known case of *In bonis Taylor*, [1929] P. 260, will show that it is not easy to steer a straight course. On the other hand the framers of the Law of Property Act, 1925, did not appear to consider it necessary statutorily to decide whether or not a trust for sale had come to an end. All they were prepared to do was to assist a purchaser by permitting, but not compelling, him to assume that the trust for sale continued to subsist until a conveyance to or by the direction of beneficiaries absolutely entitled: L. P. A., s. 23. Even for the purposes of making title on a conveyance on sale this absence of definite provision can be difficult. In other cases it can be very embarrassing. To take a very elementary example; in a part-

nership deed between two partners the survivor has an option to purchase the deceased partner's share which, in fact, the surviving partner exercises. How should the survivor rid the title of the statutory trust for sale (*Re Fuller's Contract*, [1933] Ch. 652), because it is usually not desired by the surviving partner to appoint a new trustee however elegant that might be for the purposes of the Abstract of Title? No doubt it can be done by bringing the equities on the title, a procedure which the Property Legislation was designed to avoid, and by an instrument drafted in a form that defies elegance.

But even assuming that from the purely conveyancing aspect, that is from the angle of a possible Abstract of Title, a trust for sale is more desirable than a settled land settlement, we should examine the question whether, in fact, settlors should be advised to avoid the settled land settlement in favour of the trust for sale.

Let us begin by being clear about our hypotheses. To begin with we are not really concerned with the accidental settlement that admittedly causes a good deal of trouble—it is not essential to the notion of the strict settlement. Indeed, but for the repeal of the Statute of Uses most of such settlements would not need to arise. An implied power of sale in favour of the trustees with ancillary powers of leasing and management would have met the case. Again, we are not denying that where land is only an accident of the settlement which is primarily a mere trust fund of various investments, there can be no doubt that a trust for sale is both convenient and desirable. The settlor regards the beneficiary as a mere recipient of net income. The old conveyancer's name for such a settlement, a "trader's settlement", seems peculiarly apt—the beneficiaries are sleeping partners. But notwithstanding the incredulous amazement of town-bred lawyers there remain a number of persons, indeed the number is not particularly small, to whom some "blessed plot" of this "green and pleasant land" means a great deal more than a source either of capital or income. It is a focal point of "life" and duties are owed, if not in law then in fact, as well as benefits derived. Nor must it be assumed that this feeling is confined to a few large-landed families. Farmers have been known to farm the same farm as tenant farmers for literally hundreds of years, and now times are changing they do not love the land less because they own as well as farm it. It is in these cases when the last thought in the settlor's mind is that the land should be sold that the question really arises whether or not the settlement should be by way of trust for sale. No doubt in many cases the point remains academic because the lawyer is met by an emphatic negative anyhow, but assuming that the client is as wax in the hands of his adviser what should the lawyer do?

In the first place let us notice that one of the peculiarities of the modern position is the unreality that exists whatever form we choose for a settlement. On all reasonable assumptions a trust for sale is a trust to sell (see *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62) and there should be some special reason for a sale not being carried out. This is still recognised to the extent that one co-trustee can compel the other to sell though obviously it would be the last thing intended by the settlor: see *Re Mayo's Will Trusts*, [1943] Ch. 302,

noted *ante*, p. 110. But to adopt the trust for sale as a normal, or even possible, form of settlement for the case which I have postulated reduces the trust for sale itself to something bordering closely upon a legal fiction. Really it was not the intention of the settlor to create an imperative direction to sell. At the most he was prepared to give a discretion to sell if some unforeseen circumstance demanded it. In fact it is an attempt upon the part of the lawyers to force upon a certain type of landowner an economic doctrine he does not want. It is interesting to draw a parallel with the old estate tail where by a fictitious proceeding the lawyers compelled landowners to accept freedom of alienation. But we may be allowed to express some hesitation whether the methods of fifteenth century lawyers should really attract the lawyers of our own age. Nevertheless, the Settled Land Act, 1925, has forced upon us a position only a little less unreal in its turn. This can be illustrated from another case noted in this volume (*Re Fitzwalter* (1943), 112 L. J. Ch. 294, *ante*, p. 106). Here an estate owner under the Settled Land Act, 1925, leased certain mines and the question was whether or not he was entitled to retain three-quarters or one-quarter of the rents and profits. Now be it noted that the estate owner only had this power by reason of the execution of a vesting instrument as prescribed by the Act: Settled Land Act, s. 13. This vesting instrument either transferred to him or declared to be vested in him the legal estate in fee simple absolute in possession. The lease was granted by him as fee simple owner of a legal estate and, of course, in that there is nothing remarkable, because at Common Law a fee simple owner has always been able to grant such a lease. Even if he were a trustee, and even if the lessee had notice, the legal estate in the term would pass to the lessee. The only two remarkable things about this part of a lease were that (a) the lease must comply with certain rules or it would be void: S. L. A., s. 18; and (b) the tenant of the legal estate in fee simple might have to account to someone else for the rents. This latter point is not so remarkable because this fee simple owner was an express trustee: S. L. A., s. 16^a (1); but what on the surface is peculiar is that the point made turned upon Common Law waste. The Court of Appeal began by holding that this fee simple owner was impeachable for waste. It then went on to hold that this fee simple owner was not liable for waste in respect of leasing this mine, because a predecessor in title under the settlement had made a lease of the same mine and the Court founded their judgment upon *Re Chaytor*, [1900] 2 Ch. 804, where a similar point was adjudged in favour of a legal tenant for life.

It is at least a pleasant conceit to resurrect those learned Judges Littleton and Coke and point out to them that there are now two sorts of fee simple estate at Common Law (or is it by statute?), and for one of these the tenant is liable for waste according to the rules of the Common Law and for the other he is not. Shall we hope that these shades reside in places where language is controlled? Coke at least should be able picturesquely to describe the fact that the application of Common Law waste to the fee simple estate is a contradiction in terms. Since the statute 12 Car. 2, c. 24, it is more of an anomaly than in Coke's own day. Since the abolition of escheat by

the Administration of Estates Act, 1925, it is manifestly absurd—but this must not be understood to mean that the decision is wrong.

The restrictions upon disposition imposed by section 18 of the Settled Land Act are little less inconsistent with the fee simple than the application of the law of waste. Indeed, this is implied clearly enough in the language that describes rights normally incident to the estate as “powers” and “powers of a tenant for life”, the most limited form of freehold interest. It will be borne in mind that so far as the legal estate is concerned these restrictions apply not less to an estate owner who under the settlement is entitled to a beneficial fee simple than to an estate owner who has no more than a life interest under the trust instrument.

Another illustration of the anomalous position, which arises in Settled Land Act settlements, may be found in *Re Liberty's Will Trusts*, [1937] Ch. 176. There the estate owner for the time being, who was a tenant for life in possession in equity, obtained advances for improvements which were not improvements for the purposes of the Act. He borrowed money in fact. To repay the money he charged the settled land under the Settled Land Act, 1925, s. 85. As estate owner under the Settled Land Act, 1925, he had no power to create such a charge because the improvements were not authorised: S. L. A., s. 18. His life interest was defeasible upon it being charged. It was held that he had not charged his life interest, because, although beneficially entitled, he had acted only as estate owner. Comparison of this decision with that in *Re Fitzwalter* (*supra*) may give food for reflection. To decide whether or not a fee simple owner is liable for waste you may look at his beneficial interest in equity, but you may not do so to decide whether or not an estate owner has imposed any charge on his beneficial interest where he has covenanted to pay borrowed money but has acted upon a misconception of the Settled Land Act.

The fact of the matter is that the estate owner under the Settled Land Act, 1925, is in as nearly a fictitious position as the trustee for sale. For purposes of their own the lawyers have forced settlors to employ devices that are inconsistent with the true purposes of the settlement. Rightly or wrongly the old Common Law recognised, if it did not actively encourage, which some historians think it did, the growth of family settlements in both the real as well as the legal sense. The family had roots and those roots abided. Sometimes new families were planted, but they also grew roots. This new system assumes that land is a thing of commerce and that all the conveyancing connected with it should be designed so that it may be sold easily. This is, of course, just what the settlor does not want and has had forced upon him by the lawyer with the aid of Parliament: cf. S. L. A., s. 106, and *Re Acklom*, [1929] 1 Ch. 195; *Re Patten*, [1929] 2 Ch. 276. So also, a devise to a nephew for life “or so long as he should reside upon and assist in the management of” the testator’s farm was held to be valid only provided that the property was not sold, though in this case the statutory trust for sale was invoked: *Re Davies' Will Trusts*, [1932] 1 Ch. 330.

We agree that it is for the general policy of the Government to decide concerning the freedom from restriction upon alienation of

land. If this has been decided by the Legislature then again, of course, effect must be given to it in the decisions of the Court. It is submitted, however, that so far as the conveyancer is concerned it is his duty to give effect to the wishes of his client unless the law otherwise provides. *Therefore it is to be observed that the sole real question is which type of settlement really gives effect as nearly as possible to the wishes of the settlor.*

It will be observed that these general observations raise two problems on the difference between strict settlements and trusts for sale. First, there is the method of freeing the legal estate where the settlement comes to a natural end, otherwise than by sale, from the trammels of the statutory restrictions, and secondly the relation of the beneficial owner to the land itself presents real difficulty during the continuance of the settlement. Actually there is a third point which is intimately connected with the theme of this article, namely, the rights of those taking in remainder under the settlement to have the land handed on to them. This last consideration is closely bound up with the second point. Because the second point would ultimately be the determining feature in the choice of method we deal first with that.

I.

Enjoyment, Management and Disposition by the Tenant for Life.

In a family settlement the settlor probably has two main objects primarily in mind. First, that the beneficial owner for the time being in possession shall reside on the estate and manage it. Indirectly this results in the second object, namely, that the estate should be kept together and passed on intact to the remainderman. Originally the powers now contained in the Settled Land Act, 1925, or something like them, were inserted in settlements, particularly to provide for leasing and management of such things as timber and mines, but sale was regarded as a last resort. Both the Legislature and the conveyancer seem to be apt to overlook this aspect of the case, and it is particularly significant in this discussion that these powers of leasing and management are conferred upon trustees for sale by reference to the Settled Land Act: Law of Property Act, s. 28 (1). The same sort of inherent background is found in the provision (L. P. A., s. 26 (3)) that if the trust for sale is created by or under the powers conferred by an Act the trustees for sale must *so far as practicable* consult the persons beneficially interested in possession of the rents and profits until sale and *so far as consistent with the general interest of the trust* give effect to the wishes of such persons or the majority of them. The sub-section can apply to ordinary trusts for sale if such an intention appears in the instrument creating the trust. As persons beneficially interested includes annuitants (*Re House*, [1929] 2 Ch. 166) the scope of the sub-section is fairly extensive, particularly as it applies to all powers statutory or otherwise: *Re Jones*, [1931] 1 Ch. 375. Nevertheless the wording put in italics emphasises the dominance of the trust to sell: cf. *Re Davies Will Trusts*, [1932] 1 Ch., at p. 536.

It is obvious that the powers of disposition and the right to put the proceeds of capital assets in the pocket of the tenant for life very

largely determine how far the estate will be handed on intact. This has, indeed, been the problem in law since 1882 and the problem in fact much earlier. Consequently, we have summarised under separate headings the principal points of comparison between the two forms of settlement.

(i) Although both types of settlement are in the nature of legal fictions there is one substantial difference. The family settlement intends the property to be "owned and managed" by the head of the family for the time being. It normally contemplates the residence of such head on the land. Under a trust for sale the legal estate and the right to possession at Common Law is vested in trustees who are under an imperative trust to sell. By section 29 of the Law of Property Act the trustees *may* delegate the powers of leasing and management to the tenant for life which, presumably, carries the right to enter into possession and reside, and the Court *can* direct the trustees to exercise this discretion in favour of the tenant for life: *ibid.*, s. 30; cf. *Re Bagot's Sett.*, [1894] 1 Ch. 177 (on the analogous S. L. A., 1882, s. 7). On the other hand if the settlement is properly created under the Settled Land Act, 1925, the tenant for life will in fact be the owner of the legal estate carrying with it the right to possession and residence, subject to subsisting leases, and all the powers of disposition and management will in the ordinary case be exercised by him, though subject to the limitations and restrictions imposed by the Act. In all probability, so long as the law permits, a certain number of lay clients will insist upon the settled land settlement, if they know of its existence. In our view this is a wise instinct—the law should not have to resort to devices to enable the circumstances of social life, which are recognised as valid by the community, to be carried into effect. There appears to be no valid ground for an assumption that the family settlement is disapproved of by the general community.

(ii) In fact, however, it seems to be possible to impose a greater restraint upon alienation in the case of a trust for sale than a "strict" settlement. It is true that in the case of a mansion house (see *Re Feversham S. E.*, [1938] 2 A. E. R. 210) the consent of the trustees or the Court may be made necessary to a sale: S. L. A., s. 65, but in all other practical cases the estate owner for the time being has sole authority to decide on a sale and in the exercise of his powers he cannot be restrained, provided that he is acting honestly and also in the opinion of the Court in the interests of all parties: *Re Richardson*, [1900] 2 Ch. 778; cf. *Gilbey v. Rush*, [1906] 1 Ch. 11, notwithstanding that he may benefit personally, while the exercise may be a detriment to the remainderman: *Re Lord Stamford's Estate*, 56 L. T. 484. Under a trust for sale the settlor can provide that the sale shall only be made with the consent of the tenant for life for the time being, and a purchaser is concerned to see that any consents not exceeding two have been obtained: L. P. A., s. 26, so that, in practice, it may be necessary for at least one trustee and the tenant for life to agree to sell, though the Court can direct a sale where consent is refused: L. P. A., s. 30; *Re Beale's Settlement*, [1932] 2 Ch. 15. Actually, it might be more to the point if the settlor were to provide that the consent of the person next entitled

in remainder were required. It does not seem that there is any need to limit the consent to a person ascertained at the date of the settlement.

Although a residence clause inserted in a strict settlement is not effective to prevent a disposition under the Act, it will operate if the residence ceases prior to a disposition: *Re Patten*, [1929] 2 Ch. 276. A similar clause inserted in a settlement by way of trust for sale might be valid, though it is submitted that it is inconsistent with the nature of the trust: cf. *Re Davies' Will Trusts* (*supra*), but this case is probably limited in its effect to the statutory trust for sale.

(iii) Apart from sale under the trust for sale a tenant for life can have delegated to him the powers of leasing, accepting surrenders of leases and management conferred upon the trustees by the Law of Property Act or otherwise: L. P. A., s. 29. This delegation must be revocable though a purchaser is protected if the writing is produced: *ibid.*, sub-s. (1). Management is not defined by the Act, but it is possible that it may be interpreted in the light of the Settled Land Act, 1925, s. 102, since that section applies to trustees for sale whether or not there is a minority: *Re Gray*, [1927] 1 Ch. 242. It is assumed that the tenant for life or other limited owner under a trust instrument under the Settled Land Act has similar powers of management provided that he has the legal estate vested in him by virtue of a vesting instrument. It is just here that the law requires more examination, and perhaps more decisions, than seems generally to have been accorded to it. Let us take a simple illustration. Suppose X is a tenant in tail under a trust for sale and has been let into possession by the trustees for sale who have also delegated to him the powers of leasing and management. X grants a mining lease of a new mine to Y under the Settled Land Act powers. Is X entitled to three-quarters of the income? Again, X decides to open a slate quarry and work it himself. Can he do it? If he does, does he take all the profits? And then, would the position be different if X was a tenant for life and not a tenant in tail? If so, why would it?

To begin with, it should be pointed out that under section 102 of the Settled Land Act there is no power to open new mines, though there is power to work existing ones. Then to proceed, the Law of Property Act, 1925, s. 28 (2) provides that the *net* rents and profits, after keeping down repairs and insurance and other outgoings, shall be applied as income except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act. The Settled Land Act, 1925, s. 47, draws a distinction regarding the application of the income according as the tenant for life (which by definition includes, *inter alia*, a tenant in tail) is impeachable for waste.

It is natural to assume that a tenant in tail is not impeachable for waste and that he can, therefore, both enjoy the rents of the lease and if he so wishes work the mines himself. This may be so, but it seems very difficult to find authority for either proposition. In *Re Ridge*, 31 Ch. D. 504, it was held that where a person was entitled during his life under a trust for sale to the income of land until sale and after sale to the income of the proceeds of sale he was not in a strict sense impeachable for waste, but he was impeachable within the

meaning of section 11 of the Settled Land Act, 1882 (being the equivalent section with section 47): cf. *Re Hodgkinson*, 132 L. T. 526. Section 130 of the Law of Property Act which creates this new form of equitable interest in tail in the proceeds of sale of land is silent upon its characteristics with regard to waste. This, it is submitted, is strictly correct, because it is hardly correct to refer to waste with regard to any equitable interest. Furthermore, where a lease was granted under an express power prior to 1926, a life tenant under a trust for sale was held only entitled to a fair equivalent to the income had the estate been sold: *Wentworth v. Wentworth*, [1900] A. C. 163; cf. *Re Woods*, [1904] 2 Ch. 4; but where there was a direction to pay income the tenant for life seems to have taken the rents of opened mines: *Greville-Nugent v. Mackenzie*, [1900] A. C. 83; *Re Hall*, [1916] 2 Ch. 488.

It is submitted that the true solution is that the law of waste does not apply at all to beneficial interests under a ^{trust} ~~tenant~~ for sale. The cases are attempts to construe the intention of the settlor in individual settlements, and that where there is no clear intention that the limited owner shall benefit to the detriment of the capital fund the Court will hold that he cannot do so. Hence he will be treated as impeachable for waste for the purposes of section 47 notwithstanding section 28 (2) of the Law of Property Act.

Whether a tenant in tail under a trust for sale could, in the absence of any express power, open a mine seems to be even more bare of authority. It is obvious that if he is to be treated as impeachable for waste he could not do so: see *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 458, unless it is argued that a trustee for sale could open a mine and that this was a power of management which could be delegated under section 29. It is thought, however, that there is no power in the trustees, though the Court could authorise it under the Trustee Act, 1925, s. 57.

The authorities upon the position of a life tenant in connection with timber are rather greater and will be considered next. They do not settle the problem whether a tenant in tail of the proceeds of sale is to be regarded as impeachable for waste. Nor do they really settle the issue whether or not waste is appropriate to a tenant for life of proceeds of sale.

(iv) There does not appear to have been any decision on the Settled Land Act, 1882, s. 35 (now S. L. A., s. 66) analogous to *Re Ridge* (*supra*) on section 47, but it is generally assumed that a life tenant until sale would have been treated as impeachable for waste. There is an old case supporting this: *Plymouth v. Archer*, 1 Bro. C. C. 159, in which a tenant for life under a trust for sale, where after sale the proceeds were to be invested in land and settled to the use of a person for life *without impeachment of waste*, was held not to be entitled to cut timber notwithstanding that the tenant for life until sale was to take the rents and profits. It seems improbable that section 28 (2) of the Law of Property Act alters the position apart from express provision in the settlement. Where, however, larch trees (not being timber trees) were cut by trustees for sale in due course of management the proceeds *after deducting the cost of replanting, repairing and fencing* were payable to the tenant for life

because no question of waste arose in the ordinary sense: *Re Trevor-Batye*, [1912] 2 Ch., at p. 342. In *Re Harker's Will Trusts*, [1938] Ch. 323, Simonds, J., refused to make a tenant for life replant on the ground that there was no rule at law or in equity requiring a tenant for life to do so where the wood cut is not timber and cut in the ordinary course of management. It is submitted with some hesitation that a tenant for life under a trust for sale could only cut trees in the ordinary course of management, notwithstanding the provisions of the Law of Property Act, on the terms provided in *Re Trevor-Batye* (*supra*) unless the contrary intention appeared in the settlement. This may be the interpretation to be put upon section 102 (2) (a) and proviso of the Settled Land Act, 1925, which applies to all trustees for sale: *Re Gray*, [1927] 1 Ch. 242. The principle should be that such a life tenant has no wider power to cut trees nor greater authority to put the proceeds in his pocket than the trustees would have had to cut and pay the proceeds to the tenant for life. So, it would seem that extraordinary windfalls caused by gales, *Re Harrison*, 28 Ch. D. 220, or by extraordinary sales, *Re Terry*, 87 L. J. Ch. 577, are not to benefit the tenant for life exclusively, but be treated as mixed capital and income, and this irrespective of the law of waste, or whether or not the trees are timber trees.

(v) Similarly, in the case of repairs the position must be that a tenant for life in possession under a trust for sale is in the position of the trustees and, as indicated by section 28 (2) of the Law of Property Act, there is a liability in respect of repairs, insurance and other outgoings. It is suggested that the draftsman of this provision may have had in mind the order made on directing that the tenant should be allowed to go into possession: see *Re Wythes*, [1893] 2 Ch. 369; *Re Bagot*, [1894] 1 Ch. 177. Among the undertakings which the tenant for life was called upon to give were that he would keep the buildings insured against fire and the property in repair; though apparently the trustees are not bound to exercise the power to insure: *Re McEacharn*, 103 L. T. 900; now see T. A., s. 19. It is generally admitted that no obligation to keep in repair falls upon a tenant for life of freehold: *Re Cartwright*, 41 Ch. D. 532; *Re Lacon*, [1911] 2 Ch. 21. Similarly, he would not apparently be liable to insure: *Re Bennett*, [1896] 1 Ch. 787. The result of these factors is that if the tenant for life sees fit to do repairs or insure he cannot make any claim against capital: *Re de Teissier*, [1893] 1 Ch. 153, even in the case of destruction by dry rot: *Re Legh's S. E.*, [1902] 2 Ch. 274, apart from the provisions of the Settled Land Act, 1925, s. 83.

The position of trustees for sale is not equally clear. If the trustees did manage the property and did repairs the repairs came out of income, but where resort was had to the Court to authorise substantial repairs the Court ordered the cost to be apportioned between capital and income: *Re Hotchkys*, 32 Ch. D. 415; *Re Freeman*, [1891] Ch. 28, but each case probably depends on its own merits: *Re Farnham*, [1904] 2 Ch. 561. The trustees for sale now have power to do repairs and insure out of income under the Settled Land Act, 1925, s. 102; *Re Gray*, [1927] 1 Ch. 242, but probably this power should not be exercised in respect of structural repairs to which

the principle in *Re Hotchkys* (*supra*) still applies: *Re Conquest*, [1929] 2 Ch. 353, though the Court will not normally interfere: *Re Robins*, [1928] 1 Ch. 736. If the trustees decline to exercise their discretion the Court will do so and act upon the principle of *Re Hotchkys* (*supra*): *Re Smith*, [1930] 1 Ch. 88. But what is the tenant for life who has gone into possession and to whom the powers of management have been delegated to do? Clearly there is here a conflict of interest, since he does not wish to pay for repairs out of income. On the other hand, as a delegate of the trustees, who would be under a duty to maintain the property, should he not do the repairs?

(vi) It will be borne in mind that the powers of the trustees are exercised by the tenant for life until sale in the name of the trustees and on their behalf and the tenant for life shall be deemed to be in the position and to have the duties and liabilities of a trustee: L. P. A., s. 29 (2), (3). This involves two features. First, all legal interests remain in the trustee except those arising from possession. So, for example, it would apparently be unlawful for the tenant for life to levy a distress even in respect of a weekly tenancy: cf. *Schalit v. Nadler*, [1933] 2 K. B. 79, except so far as he can do it in the name of the trustees. Presumably he could bring an action for trespass in his own name in respect of property of which he was in actual possession, but whether he could bring an action to protect the reversion of any property leased seems more doubtful. Similarly, unless he is in occupation, he does not seem to be able to sue in his own name for disturbance in the nature of nuisance nor to protect a servitude. Likewise he cannot bring an action on the covenants of a lease, since he is not the covenantor. Psychologically in the management of a country estate this duty to act in the name of another seems unsound.

Since the delegation must be revocable and since it seems also to be purely personal, the tenant for life must seek renewal of it at every change of trustees and seemingly cannot exercise the powers during an interregnum. Secondly, there is the fiduciary position of the tenant for life in the exercise of his powers. The actual language used is identical with that in the Settled Land Act, s. 107, so far as the words of trusteeship go, but the sub-section of the Law of Property Act does not include the words that the tenant for life shall "... have regard to the interests of all parties under the settlement". Whether this distinction will make any difference remains to be seen. It should, however, be observed that strictly the tenant for life should not be able to do any act which the trustee could not do. This may be more stringent than the restrictions imposed by the Settled Land Act. Probably the omission of the words mentioned above is due to the provisions of section 26 (3) of the Law of Property Act, 1925, which, so far as the trustees are concerned, are more specific. They shall, so far as is practicable, consult the persons of full age interested in possession and, "so far as is consistent with the general interest of the trust", give effect to the wishes of such persons. This sub-section obviously cannot apply generally to a tenant for life in possession, and in any event can be excluded by the trust instrument. The exclusion of the "general interest of the

trust" may be regarded, perhaps, as equivalent to the "interests of all parties under the settlement". If this is so we do not appreciably clarify the position, and in the absence of any authority it would be safer to assume that the tenant for life is under the equivalent obligations of the trustees for sale had they been in possession.

(vii) One further point should be mentioned, namely, that it has been laid down that a tenant for life is not necessarily entitled to possession of the land under a trust for sale even in equity: see *Re Stamford and Warrington*, [1925] Ch. 162, where the authorities are discussed. The reason for excluding the tenant for life in this case was the special obligations imposed upon the trustees by the trust instrument. This is important, because it may be desirable to include additional powers and duties in the trustees, but at the same time make it clear that the trustees shall have power to delegate them to any tenant for life and so disclose an intention sufficient to exclude the reasoning in *Re Stamford and Warrington* (*supra*).

II.

Protection of the Remainderman's Interest.

It has become apparent that the several powers of disposition and management severally vested in an estate owner for the purposes of the Settled Land Act and a tenant for life under a trust for sale give no clear-cut answer to the settlor proposing to preserve his estate as far as possible. On the surface, however, it would appear that the tenant for life under a trust for sale has more limited powers in every way than the estate owner. What is more he can only exercise these powers by delegation and in the name of the trustee because he has no legal estate. Therefore, any abuse of the powers must, we think, be invalid—it is one of the ways in which the *bona fide* purchaser, the spoilt darling of the Property Legislation, is not protected.

On the other hand the position does not stand quite like that. Behind the tenant for life under a trust for sale stand the trustees, and the tenant for life may be one of them. Now the Settled Land Act provides several methods for the protection of remaindermen, including the necessity to pay capital money to two trustees or a trust corporation: section 18 (1) (c); notice to trustees: section 101; trusteeship of the estate owner's powers: section 107. Indeed, the trusteeship involves a consideration of something more than the merely material benefits arising from the settled property, and sentimental considerations may, apparently, play their part in determining the propriety of a sale: *Re Hope*, [1899] 2 Ch. 679, but the Court does not like to interfere with the discretion of the tenant for life: *Re Richardson*, [1900] 2 Ch. 778, provided, of course, that he is acting *bona fide*.

But the vital check in the Settled Land Act is section 18 which provides that where the land is subject to a vesting instrument any disposition not authorised by the Act is void. The section is not limited to dispositions of the legal estate but contains an exception in favour of a disposition "for the purpose of conveying or creating such equitable interests as he [a tenant for life or statutory owner]

has power, in right of his equitable interests and powers under the trust instrument, to convey or create". But this exception must be viewed in the light of *Re Liberty's Will Trusts*, [1937] Ch. 176, in which a disposition purporting to be made by a tenant for life as estate owner under the Settled Land Act was held not to constitute a disposition in respect of his equitable life interest. There are also certain protections for a *bona fide* purchaser, so a lessee shall be presumed to have executed the counterpart necessary for an authorised disposition by way of lease if he produces a lease executed by the estate owner : S. L. A., s. 42; or at least the production of such shall be *sufficient* evidence of the execution of the lease : cf. *Re Duce and Boots' Contract*, [1937] Ch. 642. These cases of protection only serve to emphasise the fact that otherwise the disposition would be invalid. Indeed, section 18 looked at as a general principle may have a very peculiar effect, namely, to divest all the rights of disposition normally vested in a fee simple owner and completely reverse the Common Law rule that restrictions on alienation cannot be imposed on a fee simple absolute. This would, of course, result further in the rule that the so-called "powers of a tenant for life" are really powers and not merely the permitted exercise of the rights of alienation inherent in the estate in fee simple. Unless and until this question is raised before the Courts the answer seems incapable of determination. Nevertheless, one thing is quite clear, namely, that apart from express powers conferred by the vesting instrument in pursuance of the trust instrument, an estate owner under the Settled Land Act has no powers at all save those conferred by the Act. The defence of *bona fide* purchaser of the legal estate will not avail and it is submitted that a purported disposition of the legal estate will not pass that estate. So, if an estate owner were to forge a title deed to himself in fee simple free from the settlement and were to convey to a purchaser without capital money being paid to the trustees, it would seem that though the purchaser has acted perfectly in every way he gets nothing at all and can pass a title to nothing. Having regard to the difficulties of acquiring a title in fee simple to settled land by virtue of the Limitation Act, 1939, s. 7, the importance of ensuring that the title under the Settled Land Act is perfect cannot be over-emphasised. On the other hand, from the point of view of beneficiaries under the settlement this stringent check on unauthorised dispositions is something the settlor naturally favours.

Now in the case of a trust for sale the position is really reversed. Any disposition is valid unless the person taking under it cannot plead that he is a *bona fide* purchaser of the legal estate without notice. To this there may be the exception of failing to pay capital money to two trustees or a trust corporation : L. P. A., s. 27 (2); but this provision is not free from ambiguity in this connection, and it certainly seems open to argument that if a purchaser was ignorant of the existence of a trust for sale he gets a wholly good title notwithstanding that he has paid the capital money to one person only. In any event the legal estate would seem to pass under such a conveyance, so that a purchaser from the original grantee would presumably take free from any liability to pay the purchase money to proper trustees. This aspect of the law is perfectly rational

because trusts for sale were intended for the disposal and not for the management of land and the essential responsibility was meant to be on the trustees and not on the tenant for life. So, for example, under sections 16 and 17 of the Trustee Act, 1925, persons lending money to trustees for sale on a mortgage expressed to be raised under section 16 are not "concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof". Indeed, as against the outside world this is for all practical purposes a power equivalent to that of the beneficial owner absolutely entitled. There is a somewhat similar power under the Settled Land Act, s. 16 (1) (iii), but it requires the intervention of both tenant for life and trustees.

Obviously the powers of disposition of a trustee for sale are wider than those of an estate owner, and apart from this the capacity to dispose is only limited by the somewhat inadequate equitable doctrine of notice. On the other hand the trustees may in equity be bound to preserve the trust property for the remainderman in a manner which is not imposed under a strict settlement. This we have discussed already under the first head. But leaving this very important but somewhat indefinite topic aside, the settlor who wishes to safeguard the beneficiary as much as possible should choose either a settled land settlement or a trust corporation as a trustee. If he selects the latter option the estate will have the privilege of paying for it, and it is not an uncommon experience to find that the trust corporation is very inflexible in its attitude towards developments of trust property,

III.

The Determination of the Settlement.

Since we have assumed that our settlor desires the land to remain settled the determination of the settlement will not be his major consideration. Nevertheless, getting rid of legal superfluities should not be disregarded altogether. Once again the general tenor of the Acts assumes that a trust for sale is a trust to sell, but that settled land may cease to be settled without being sold.

Once a trust for sale has been created the land remains subject to the trust for sale, at least so far as concerns a purchaser, until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale: Law of Property Act, 1925, s. 23. Note that the section does not say that the trust for sale does continue to subsist but merely that for the protection of any purchaser thereunder it shall be deemed to subsist. Thus, if A and B are trustees for sale for C for life and subject thereto to B in fee simple, and if D buys from the two personal representatives of A being the last surviving trustee, then D gets a good title whatever may have happened to C's and B's interests respectively. On the other hand, if on the death of C in the lifetime of A and B, A and B then convey the legal estate to B and D buys from B, *presumably* D is not protected by this section, because he is not taking under the trust for sale and he has notice of trusts. Therefore, if before the conveyance to himself B had disposed of the whole or part of his beneficial interest the purchaser from B would have to show that he had no constructive

notice. Quite how B satisfies a purchaser that he is entitled in fact to the equity is one of the problems left unsolved by the Act.

2. It is to be observed that the trust for sale cannot automatically be determined. Although under section 36 of the Law of Property Act as amended, nothing in that section will prevent a sole surviving joint tenant absolutely entitled in equity from selling as if the trust for sale had ceased, even then it is not necessary for him to do so. But on the contrary if he wishes not to appoint another trustee he must, apparently, satisfy a purchaser that he is beneficially entitled absolutely, because otherwise the sale will not be good for want of paying the purchase money to two trustees. Again, how a vendor can really satisfy a purchaser so that the purchaser is completely protected is one of the unsolved mysteries of the legislation. How far the old rules governing *bona fide* purchasers of the legal estate are applicable, it is submitted, it is difficult to say.

Apart from the problems of title, which are not the immediate concern of this article, we can see how this operates against satisfactory management. A and B are trustees for sale for C, an infant. A and B agree to grant a lease of a quarry but negotiations are protracted. C comes of age and directs the property to be conveyed to himself. Against whom can the lessee's claim be directed and, if despite C's direction A and B grant the lease, is it valid? The answer is that the lessee is a purchaser and the trust for sale must be presumed to subsist. Now, turn it round, and assume that C had granted the lease before he had put an end to the trust for sale by getting the legal estate conveyed to him. This would not be very valuable to the lessee, presumably, because the powers of management would be in the trustees. Can a lease be granted of the proceeds of sale of a quarry?

It would appear that once an estate has been subjected to a trust for sale it is not easy to get rid of it satisfactorily. The Acts assume that the land will ultimately be sold. Which, of course, is strictly the correct attitude to adopt towards a trust for sale.

2. Nor is there any real provision for a derivative settlement. If A and B are trustees for sale for C for life and after his death for D and D dies in C's lifetime leaving the property to E and F as trustees for G for life with remainders over, what happens on C's death? Strictly speaking it would seem that as the property is held on trust for sale the Settled Land Act does not apply and consequently neither E and F nor G are entitled to a legal estate. It is doubtful whether A and B could make a valid conveyance by way of vesting instrument in favour of G and, of course, such a conveyance not being for valuable consideration it could afford protection to no one. No doubt those who favour the trust for sale will not regard this position as a hardship, but it certainly does not carry out the intentions of D who, had he been alive, could have required the legal estate to be conveyed to himself.

Had D bequeathed his interest to E and F on trust for sale for G for life with remainders over, presumably E and F could call for the legal estate to be vested in themselves. If A and B appoint E and F as trustees in their place and the trust for sale is ultimately brought to an end without sale, then presumably the trusts of both trusts for

sale must be brought on the title to show how the trust for sale has come to an end. This may be very cumbersome and the facts not easy to collect by the time it becomes necessary. On the other hand, is a purchaser entitled to accept without investigation a conveyance by the joint trustees in favour of the second trustees simply dependant upon a recital that the second trustees have become entitled in equity? A purchaser is not concerned with the application of purchase money paid to trustees for sale: *Re Chafer and Randall's Contract*, [1916] 2 Ch. 8; *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258; but the rules governing notice on transfer by trustees for sale without consideration seem to be virtually non-existent, because the question does not seem to have been taken. On general principles, since there is notice of a trust the purchaser must satisfy himself that the voluntary conveyance was proper, that is to say, that the trusts come on the title. This, of course, is in direct contrast to the provisions where there is a derivative settlement of settled land: see Settled Land Act, 1925, s. 17, combined with section 110.

Apart from judicial decision the position of settled land would have been simple legally though occasionally troublesome in practice. Once a vesting instrument was executed the legal estate would remain in the estate owner under the instrument or the trustees of the settlement as special personal representatives until a deed of discharge cleared the settlement off the title. Such a deed of discharge completely protected a purchaser in favour either of a person taking absolutely or of estate owners under a new vesting instrument or a trust for sale.

The spartan simplicity of this judicial fact has been somewhat marred by the decisions in *Re Alefounder's Will Trusts*, [1927] 1 Ch. 360, which dispenses with a deed of discharge, if there is no vesting instrument, and is, therefore, relatively unimportant save for transitional provisions; *Re Thomas*, [1939] Ch. 513, which seems to permit of the legal estate passing between general and special personal representatives in the event of the application of section 36 of the Settled Land Act relating to undivided shares falling into possession; and *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, where the land ceases to be settled at the estate owner's death, but not where it is resettled: *In b. Taylor*, [1929] P. 260. But in fact none of these cases is really so doubtful in its effect (except, perhaps, *Re Thomas*), particularly because their application is largely affected by the existence or otherwise of a settled land grant: and see S. L. A., s. 110 (5). What is more, they are really concerned mainly with the "accidental" settlement. The fact is that the Acts have provided very adequately for the termination of settled land settlements and have practically ensured that the legal estate shall go as desired by settlor, save possibly in the odd cases where the settlement comes to an end on the death of the existing estate owner without a new settlement or a trust for sale coming into effect. Even here, however, no hardship is involved. The general personal representatives will in fact be called on to assent to the vesting of the legal estate in the persons entitled absolutely.

It is thought that in the matter of its determination, whether or not to give effect to a derivative settlement, the settled land settlement is undoubtedly superior to that of a trust for sale.

IV.

General Conclusions.

It seems clear enough that in the outlying aspects of the topic, such as protection of remaindermen and determination of settlements, the provisions of settled land settlements are more adequate. It is in the vital question of management that the law is most obscure, and consequently it is most difficult to arrive at a decision. In fact the comparisons which we have drawn governing the enjoyment and powers of disposition show advantages on both sides. Some clarification of the law would probably make determination of the problem simpler.

The net result of these comparisons display two factors. First, and most imperatively, the somewhat uncertain position of a tenant for life allowed to go into possession under a trust for sale without any order of the Court. Although, in our opinion, the position of an estate owner under the Settled Land Act has not been examined adequately in the light of the changes introduced by the legislation which have conferred upon a fee simple interest and made him a trustee, it is thought that his position is far better defined than that of a tenant for life in possession under a trust for sale.

Secondly, there are some clear differences between the two, some of which favour the trust for sale as a stricter type of settlement than that of the Settled Land Act. For example, if the trustees for sale could only sell the property with the consent of any tenant for life or tenant in tail of full age, whether in possession or in remainder, probably the chances of the estate being sold would be more remote. Whether such a consent is a "power" for the purposes of the Perpetuity Rule we do not think has ever been decided. On the other hand, under a trust for sale there must be divided control or control solely by the trustees which is contrary to the tradition of strict settlements. Practical experience of remote control by trustees who from the nature of things cannot reside on any part of the property would not encourage landowners to wish for such control in the case of landed property demanding constant supervision. Likewise the enjoyment of delegated powers of management which can be determined, at least in theory, at any time do not encourage the delegate. Ignoring the matter of simplicity of title we are, therefore, driven to the conclusion that in the present state of the law the conveyancer cannot find it an easy matter to advise his client. We may repeat that to treat the question of title on a sale as the deciding factor is to disregard the fundamental purpose of the type of settlement we are considering. To our mind the determining factors are that (i) the powers of management of a tenant for life under a trust for sale are not only anomalous but uncertain and would, to avoid litigation, require to be defined in the settlement with some degree of exactitude and consequent danger of omission; and (ii) the right to possession in a small degree and the right to delegation of the powers

of leasing and management to a greater degree are in the discretion of the trustees or the Court. This cannot fail to give some sense of unreality to the notion of the "inherited estate" which is the substratum of the strict settlement, no matter how unreal modern conveyancing devices may have made it. Here we cannot help remarking that had the system of registered conveyancing been generally applied it would be simple to avoid all questions of title and to modify the Settled Land Act requirements so that the family "heir", to give him his old title, would always be the registered proprietor and the trustees would operate as guardians of the assets and the succession. Strange as it may seem to many the merits of registered conveyancing are to be found more in the case of settlements than any other branch of conveyancing.

Under the Land Registration Act the settlement is protected by restrictions put on the proprietorship register. Consequently, a person dealing with the legal estate is concerned only with the restriction and not the method by which a proprietor has come to be registered. As the law at present stands (Land Registration Act, ss. 86—91; Land Registration Rules, 99—106) the forms of settled land conveyancing are still followed so far as dispositions for the purpose of registration are concerned. There is a prescribed restriction based essentially upon the present Settled Land Act, but section 86 (3) of the Land Registration Act contemplates flexibility in the matter of restrictions, and under rule 104 the Registrar must apparently enter such restrictions as may be applicable to the case and for which application is made.

The Land Registration Act is peculiarly silent about the powers of enjoyment of registered proprietors, but with adequate provision on this score and some modification of the present rules governing the forms leading to registration of interests this flexibility of restriction would prove an admirable way of dealing with the problem.* The person capable of making dispositions and the character of the dispositions can be controlled very simply. The powers of enjoyment and the person to whom enjoyment and management otherwise than disposition belong need not concern the register at all. At the same time all problems of equitable notice and other bugbears disappear, because the precise powers and the effect of them is defined quite clearly by the nature of a disposition by a registered proprietor. We should, however, emphasise that most of the benefits that could accrue from registering all settled land do not yet exist owing both to the stereotyped forms of restriction and to the too strict adherence to the formalities of the Settled Land Act. What is more, the vital problem of management and enjoyment requires definition, but it is submitted that in this respect the registered proprietor of land held in settlement does not differ from all registered proprietors.

But this article did not set out to produce proposals for reform but to examine the existing position. That its results should be so inconclusive should not be blamed on the writer but on the state of the law which has been caused by an undue attention to the law of "disposition" to the exclusion of the law of "enjoyment". An attitude towards interests in land which treats them rather as "choses in action" than as "choses in possession" is really as unsound

economically as it is legally. The function of the owners of interests in land should be to develop the land rather than to dispose of it, though disposition may occasionally be necessary. Consequently, we come back again to the Settled Land Act settlement, which at best vests the interest in the "owner", rather than the trust for sale which contemplates disposition rather than retention and leaves the interest in third parties. In our view the advantages now possible in a trust for sale, *e.g.*, making sale dependent upon a third party's consent, should be added to the Settled Land Act. Also the capacity of the estate owner should be more clearly defined and in our view limited. Settled land settlements should then be retained, but limited to those cases in which it is the intention to create such a settlement.

In conclusion, we would wish to make clear one or two points already mentioned. First and foremost, we have discussed the choice where a settlement is created deliberately. There is a great deal to be said for introducing a statutory trust for sale where the settlement does not, at its creation, comply with the Settled Land Act. Whether in such circumstances it will be much easier to find the statutory trustees than it is at present to get in the legal estate we hardly like to say, but Part IV of Schedule I of the Law of Property Act does not lend us much encouragement. Secondly, we have not attempted to justify the present settled land provisions. We have taken them as they are, and have admitted that the conveyancing provisions in fact make the position of the tenant for life inconsistent with the intended position, and the various technical rules do not simplify the land law though they make sometimes shorter the Abstract of Title. Finally, we have been concerned only with a "Family Settlement". Where land is merely a convenient form of investment from which the *rentier* is to derive as much income as possible and take as little interest in the property as circumstances will permit, there we think that a "Trader's Settlement" is clearly the most appropriate form.

HAROLD POTTER.

NOTES OF RECENT CASES.

1. CONVEYANCING AND REAL PROPERTY CASES.

Vendor and purchaser—express power of sale.—perpetuity.—Re W. & R. Holmes and Cosmopolitan Press, Ltd.'s, Contract, 113 L. J. Ch. 14, emphasises an important rule in conveyancing, namely, that a purchaser cannot be required to take a risk that a power was properly exercised notwithstanding that it has gone unchallenged for a number of years. If the vendor wishes to escape from providing information he must frame his contract accordingly. But the case also illustrates an important question in perpetuities, namely, that where a power of sale and, *perhaps*, collateral powers generally are not expressed to be exercisable within the perpetuity rule they will be void *unless* they may be construed to be exercisable only within a reasonable time after the falling in of any lives in being: *see Re Lord Sudeley*, [1894] 1 Ch. 334; *Re Collins' Trustees*, 19 Ch. D. 624.

This principle of perpetuity is peculiar, because it may apparently permit an uncertain period after the falling in of lives on the assumption that such period must be much less than twenty-one years. This is, of course, unusual in the case of perpetuity which will not be applied on the assumption that it will not be exercised outside the rule—an uncertain period is deemed to be an invalid period. The authorities upon this application of the rule are not numerous or very diverse. They seem to turn generally upon the validity of a collateral power of sale in trustees, but there does not appear in principle to be any justification for limiting the cases to powers of sale. In fact it should apply to all collateral powers, which are inserted for facilitating distribution of a trust estate, and there may be a wider application. The essential feature is, of course, that the power is not intended to effect restriction upon the interests of the beneficiaries in the trust fund, though it may affect the character of the fund itself.

Covenant to pay an annuity "during my lifetime"—annuity pur autre vie.—Although *Reid v. Reid*, [1944] 1 A. E. R. 134, is a decision on the Scottish law by the House of Lords, it would appear that the law is the same in both countries. A covenant to pay an annuity "to A during my life" was held to be payable during the life of the covenantor notwithstanding the death of the covenantee. A grant of an annuity without any words of limitation is deemed to be for the life of the annuitant, but where another term for payment is pointed out then the term is not inserted by way of restriction of the period of the annuitant's life but is in substitution of it: *Re Cannon* (1915), 114 L. T. at p. 232.

Charity—upkeep of tombstone—charitable and non-charitable purpose.—*Re Dalziel*, [1943] 2 A. E. R. 656, is an interesting example of the anomalous state of the law with regard to the provision by will for non-charitable purposes. It emphasises the importance of form instead of substance. The testatrix gave the sum of £20,000 to the governors of a hospital to be added to an existing discretionary fund subject to the condition that the income was to be used as far as was necessary for the maintenance of a mausoleum, and on failure to comply with this condition there was a gift over to charity. Cohen, J., held as a matter of construction that though

the fund was held by hospital trustees it could be used for non-charitable purposes, and also that there was a trust to employ the whole or part of the income of the bequest for the maintenance of the mausoleum which was a non-charitable purpose. As the trust was a gift of income primarily it was invalid and as the condition offended the perpetuity rule the gift over to charity was also too remote and failed: *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206.

The gift very nearly complied with the principle in *Re Tyler*, [1891] 3 Ch. 252, that a gift to a charity followed by a gift over to another on a condition involving the carrying out of a non-charitable purpose was valid. The distinction between the two cases lies in the fact that in *Re Tyler* (*supra*) the gift of income was not to be applied to the non-charitable purpose: see Fry, L.J., at p. 259; whereas in the instant case it was essentially part of the trusts of income. The direction about the maintenance of the mausoleum was something more than a condition upon which the gift over took effect.

There are other ways in which a gift intended for the upkeep of a tombstone may be effective. A gift to the incumbent and churchwardens for the upkeep of the churchyard and particularly a named grave has been held to be charitable: *Re Mauser*, [1905] 1 Ch. 68 (see 2 K. & E., p. 863, f. 11). A gift to a non-charitable corporation of income so long as a tombstone is maintained is valid so long as it operates as a determinable interest, that is, the fund reverts to the residuary bequest or the persons entitled on intestacy as the case may be: see *Re Randell*, 38 Ch. D. 213; *Re Chardon*, [1928] 1 Ch. 464; *Re Talbot*, [1933] Ch. 895. And, of course, as indicated above, a gift to one charity followed by a gift over to another charity upon condition that the tombstone is maintained. Such a variety of possible courses reflects little credit upon the law that holds invalid another very similar course, but from the point of view of the conveyancer it is essentially a matter of correct drafting.

(2 K. & E., p. 862, n. (t).)

Protective trusts—"to do or suffer"—resident in alien enemy country.—*Re Hall*, [1943] 2 A. E. R. 753, illustrates the impossibility of conveyancers foreseeing every eventuality and the inherent dangers in gifts over on alienation. In this case the common form clause of gift over including the clause whereby the life tenant "does or suffers" anything whereby the income becomes vested in someone else was imposed on a gift to a Frenchwoman who was residing in France at the time when it became occupied territory. Hence the income became payable to the Custodian of Enemy Property. Uthwatt, J., held that to reside in France could not be said of a French subject to be "doing" anything to cause the income to become vested in someone else. The learned Judge felt greater difficulty with the word "suffer", but he held that it meant "permit", and in his view she had not "permitted" anything to be done. Hence the gift over did not take effect.

Charity—trustees' absolute discretion to apply "to the medical profession for the furtherance of psychological healing in accordance with the teaching of Jesus Christ".—In *Re Osmund*, [1943] 1 A. E. R. 12, Bennett, J., held that a gift to trustees absolutely upon trust in their absolute discretion to apply the same for the purposes above specified was not a charitable trust. The gift did not fail for remoteness because it was an absolute gift not tied by a trust of income. It failed as a charitable gift because it was not an out-and-out gift; because there was a discretion in the trustees and there was

not a general charitable intention, and because in fact the purposes might not be effected by means of charity. The learned Judge illustrated this by suggesting the case of a very rich man whom the trustees might pay someone to go and cure by the method of psychological healing. Why this should not be "beneficial to the community, not falling under any of the preceding heads" (*Commissioners of Income Tax v. Pemsel*, [1891] A. C. at p. 583) the learned Judge did not say. If the decision has any importance besides its special facts (see *Houston v. Burns*, [1918] A. C. 337, on the general principle adopted by Bennett, J.) it lies in the restricted interpretation put upon this fourth head, which has always left the definition of a charity unsatisfactory.

The decision of Bennett, J., has now been overruled by the Court of Appeal, [1944] 1 A. E. R. 262. Lord Greene, M.R., who delivered the judgment of the Court, held that the illustration given by Bennett, J., of treatment of a rich man was not within the meaning of the words, which were for the "furtherance of psychological healing" and not "for the provision of psychological treatment". In the view of the learned Judge the money was to be applied for the furtherance of the art of psychological healing and unless so applied it would be a breach of trust, and money applied merely with the object of curing one individual without reference to the furtherance of the art of healing generally would be misapplied. The Master of the Rolls found confirmation for that view in the words "to apply the same to the medical profession".

The reference to the teaching of Jesus Christ was construed to limit the art of such healing to conformity with such teaching. Such a limit neither made it charitable nor did it destroy the charitable character.

Under which particular head of charity the gift would fall the Court did not say.

2. WILL CASES.

Nuncupative will—Home Guard—when on actual military service.—This war in which soldiers and sailors have shared front-line adventures with civilians has naturally caused a good deal of uncertainty concerning the application of section 11 of the Wills Act, 1837, dispensing with formalities where the soldier is on actual military service or a sailor is at sea. In the estate of *Anderson*, 60 T. L. R. 40, introduces us to another variation of the theme where a member of the Home Guard, having given instructions to his solicitor concerning his will, was killed during a musketry practice when acting as sergeant-instructor. The President held that in this particular case the testator was not a soldier on actual military service for the purposes of the Act. The learned Judge expressed his opinion that the test was one personal to the individual and not in relation to all the members of the armed forces of the Crown, or even in relation to all such members serving in the United Kingdom, and in this connection he concurred with the decisions of Hill, J., in *In b. Gray*, [1922] P. 140, and Pilcher, J., in *In b. Rippon*, [1943] P. 61 (*ante*, p. 40). On the other hand, he refused to express an opinion on the decisions of Hodson, J., in *In b. Spark*, [1941] P. 115, and of Henn Collins, J., in *In b. Gibson*, [1941] P. 118 n. Nevertheless, the learned Judge refused to adopt as a decisive test that the soldier was "*in ops consilii*" and pointed out that a learned member of the Probate Bar on service might well be within the Act, though he could not be described as *in ops consilii*. The learned Judge seemed to regard the question simply as one of whether or not the testator at the time of making his will was on actual military service. Had the testator been mustered to meet the enemy

or even made his will while engaged on training duties away from home the case *might* have been different.

More is likely to be heard of this problem. The cases are now difficult to reconcile. Obviously military service does not mean just that: *In b. Gibson (supra)*; nor does it mean that the testator must be "*in expeditione*" in any real sense: *In b. Spark (supra)*; *In b. Rippon (supra)*. There must apparently be an element of danger from the enemy and of removal from familiar things, but the question is how much?

Gift over on failure of children to attain twenty-one—death of only child in testator's lifetime—subsequent codicils.—*Re May's Will Trusts*, [1943] 2 A. E. R. 604, is primarily of interest as an illustration of the importance of facts as a guide to construing a will. There was a common form gift to five nieces in equal shares with a proviso that the trustees should only pay the income to the niece during her life and to a surviving husband, if any, during his life and subject thereto a power of appointment in favour of the children of each niece and subject thereto to all the children to attain twenty-one in equal shares, but if there were no children who attained twenty-one in trust for the next-of-kin of the testator. One niece had a son who attained twenty-one after the date of the will, but died before either of the codicils. This niece had no other children at all. The question arose whether that one child had in fact fulfilled the condition so that the gift to the niece was an absolute gift followed by a settlement which failed (because the son had died in the lifetime of the testator) and therefore the absolute gift took effect under the rule in *Lassence v. Tierney* (1849), 1 Mac. & G. 551. Uthwatt, J., held that on the construction of the will and codicils, having regard to the facts, the condition was not fulfilled. It was obvious that the testator by confirming the will after the son's death did not mean to include him as fulfilling the condition. The decision in *Brookman v. Smith* (1872), L. R. 7 Ex. 271, was distinguished as laying down no general rule of construction and no principle which should be followed in the case noted.

Rule in Chesterfield's Trusts — annual sums — intestacy — will.—The difficulties arising from incomplete directions concerning the relation between capital and income have been illustrated by two cases: *Re Fisher*, [1943] 2 A. E. R. 615, and *Re Payne*, [1943] 2 A. E. R. 675. In the first of these the deceased, who died intestate, left as part of his estate the right under an insurance policy to receive £52 p.a. for the remainder of twenty years next after the date of insurance (sixteen years in fact having to run) as well as a lump sum at the expiration of the period. Bennett, J., held that upon the construction of sections 33 and 46 of the Administration of Estates Act, 1925, these annual sums and the lump sums were not reversionary interests within section 33 (1), but that they were unauthorised securities which, subject to the power to postpone conferred by the section, should be got in and invested and the income paid to the widow in respect of her life interest.

The case is of importance for the distinction drawn with *Re Sullivan*, [1930] 1 Ch. 84, and the restatement of the rule in *Howe v. Lord Dartmouth* in connection with intestacies. The learned Judge explained that Maugham, J., in *Re Sullivan (supra)* had not decided that a widow was entitled to receive all royalties in respect of copyrights as income if she took on intestacy, but merely that in that particular case if the widow disclaimed her life interest under the will the direction to invest the royalties

and to treat the same as capital moneys would cease and they would become income of the testator's estate. Maugham, J., was not asked to decide what would happen to the income under the directions contained in the Administration of Estates Act, 1925, s. 33, which he held would in the circumstances then become applicable.

Bennett, J., also pointed out that there was an express trust for conversion and investment in section 33 and hence the rule in *Howe v. Lord Dartmouth* could not apply to intestacies since 1925. The rule applied only where there was no trust for conversion: *Bate v. Hooper* (1855), 5 De G. M. & G. 338; and where a trust for conversion existed its terms had to be carried out. Consequently, since there was no direction to retain except in the case of reversionary interests, the sale had to be carried out with a discretion to postpone. The learned Judge directed that if the power to postpone was exercised any money received under the policy should be treated as capital.

(2 K. & E. 878, n. (s).)

In *Re Payne* (*supra*) there was a straight gift of a life interest to the testator's widow. The property in dispute were some annual sums to be payable on death or retirement of the testator under a service agreement for the period of five years from death, etc. Uthwatt, J., followed Bennett, J., in *Re Fisher* (*supra*) in holding that these annual sums were assets of the testator's estate and not income, on the ground that "there was not and is not any tree belonging to the intestate of which the annual payments are the fruit". The learned Judge, therefore, held that the sums had to be apportioned in accordance with the principle laid down in *Re Chesterfield's Trusts*.

The learned Judge also distinguished several cases on the ground that they were decisions upon the common form trust for sale with power to postpone conversion. He said (at p. 677): "It may very well be that it is possible to arrive at the conclusion that, upon the true construction of a common form trust for sale and a common power to postpone conversion the phrase 'income of my estate' in those clauses means 'income which happens to be part of my estate' and not 'income derived from my estate'; and upon that footing I have no quarrel with the decision in *Re Sherry*, [1913] 2 Ch. 508, or *Re O'Hagan*, [1932] W. N. 188."

(2 K. & E. 877, n. (p).)

"*Probate valuation*"—*contents of house*.—*Re Eumorfopoulos*, [1943] 2 A. E. R. 719, can be shortly noted as it depends simply upon construction. The testator directed that his wife might select any articles from the contents of his house up to the value of £10,000 taken at "probate valuation". A certain figure was valued and put in the Inland Revenue affidavit which was less than £10,000 for the whole contents. The widow having exercised her option on the whole, they were mainly sold at a considerably higher value, due at least in part to changed values after the testator's death, but the Inland Revenue authorities in fact succeeded in claiming a higher value. Simonds, J., held that "probate valuation" meant the value put on the articles in the Inland Revenue affidavit and not the final figure agreed with the Inland Revenue authorities. He also held that contents included articles removed to a place of greater safety at the outbreak of war and sent to America for exhibition but intended to be returned, though actually sold out there. Certain gold plate kept at the bank, but occasionally brought to the house for exhibition, was not included in contents.

Executory trust—"for my said daughter's benefit and that of any children she may have".—*Re Potter's Will Trusts* (noted *ante*, p. 114) has been reversed in the Court of Appeal, [1943] 2 A. E. R. 805. The ground given for reversing the decision depended simply upon the construction of the particular will. In the opinion of the Court of Appeal, Bennett, J., had not paid sufficient attention to the clause defining "issue" as well as the clause giving power to make the settlement. Therefore, in their view the issue of any marriage was entitled, and not merely the issue of the particular marriage. The fact that the two clauses were separated by other clauses made it no less imperative that they should be read together. From the point of view of the conveyancer this decision is a reminder that where powers for particular benefits are inserted there should also be some special definition of beneficiaries or a reference to a general definition, since this should completely settle any doubts.

Executors and administrators—administration order—necessity of order of the Court to exercise powers.—In *Re Viscount Furness*, [1944] 1 A. E. R. 66, an order for general administration had been made in common form, and a summons was taken out to decide (*inter alia*) whether the personal representative was at liberty to dispose of the property in due course of administration without the sanction of the Court. Morton, J., held that there was no such right in the personal representative. Some of the textbooks were misleading. The personal representative could pass a good title to a chattel not specifically the subject of the suit to a purchaser without actual notice of the *lis pendens*: *Re Mansel*, 54 L. J. Ch. 833, and cf. *Berry v. Gibbons* (1873), 8 Ch. App. 747. The law appears to be correctly stated in *Lewin on Trusts* (14th ed.), at p. 313, namely, that though he pass a good title the personal representative may be personally liable for exercising his powers of disposition without the sanction of the Court.

What effect the decision has upon titles to land is not equally clear. Presumably the order is a *lis pendens* within section 2 of the Land Charges Act, 1925. If the purchaser has express notice of it he will be bound whether or not it is registered: L. C. A., s. 3 (1). Otherwise, if it is registered under the Act he is deemed to have actual notice of it: L. P. A., s. 198; so that he may be bound by it any way in accordance with the principle in *Re Mansel* (*supra*). Generally speaking, apart from bankruptcy, the doctrine of *lis pendens* does not apply to personalty other than chattels real: *Wigram v. Buckley*, [1894] 3 Ch. 483.

Will made in Scotland by domiciled Englishman—application of Wills Act, s. 15, concerning attestation by beneficiary.—An Englishman, while on a visit to Scotland, made a will on a printed form intended for use in Scotland where the requirement of two witnesses to a will is not necessary. The will was in fact attested by two witnesses, one of whom was the spouse of a principal beneficiary. It was argued that by section 35 the Wills Act did not apply to wills made in Scotland and, therefore, attestation by a spouse of a beneficiary did not affect the validity of the gift or, alternatively, that as the will could operate as a holograph will in Scotland and the property involved was only personalty, by the Wills Act, 1861, s. 2, it was a valid testamentary disposition. In *Re Priest*, [1944] 1 A. E. R. 51, Bennett, J., rejected both these arguments. Of the first he said that section 35 only operated not to affect the law of Scotland, and he was here concerned with the will of a domiciled Englishman concerning personalty. On the second head he read the decision in *Re Limond*, [1915] 2 Ch. 240,

to mean that, if he could as a matter of fact hold that the testator had intended to make a will according to Scottish law under the Wills Act, 1861, the addition of attesting witnesses being unnecessary the gift could be valid, but he did not think he could so hold on the facts before him. *Re Limond (supra)* was a case on soldiers' wills where Sargant, J., held as a fact that the soldier had intended to make a soldier's will, and so attestation by a beneficiary was irrelevant.

Administrator—writ issued before grant of administration—invalidity of action.—The doctrine that the grant of letters of administration relates back to the death of the deceased must not be taken too far. Executors have a legal title to property, notwithstanding the lack of a grant, but administrators only come into existence by order of the Court. Hence it was held by the Court of Appeal in *Ingall v. Moran*, [1944] 1 A. E. R. 97, that as the administrator had no cause of action at the date of the writ because no grant had been made to him, therefore an action for recovery of damages under the Law Reform (Miscellaneous Provisions) Act, 1934, for loss of expectation of life must be dismissed. The statements of the law made in the *Annual Practice* and the *Yearly Practice* were inaccurate. As was pointed out, however, interim proceedings for the protection of an intestate's property can be taken in the Chancery Division and, of course, after grant the title to property relates back so that an administrator may sue in respect of a cause of action arising between death and grant as he can in respect of matters arising before death. The importance of the decision is to emphasise the difference between the position of an administrator and, indeed, of an intestacy generally from the case where an executor has been appointed by a valid will. Intermeddling with an intestate's estate before grant of administration may be a serious matter.

3. LANDLORD AND TENANT CASES.

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Rent Restrictions Acts—letting to a company for the purpose of establishing the standard rent—no intention ever to occupy—not effective to establish the standard rent.—In *Conqueror Property Trust v. Barnes Corporation* (1943), 60 T. L. R. 75, an appeal to the Divisional Court by way of case stated, four flats which had been newly constructed and never let before were let in December, 1939, to a limited liability company at rents ranging from £210 to £250 a year. This company had the same directors as the landlord company and to a fair extent the same shareholders. The lettings were effected by agreements in writing containing the usual type of clauses for lettings of flats, and indeed the lessee company covenanted in those agreements to keep the premises as private dwelling-houses only. The lettings were, however, for one month only, the lessee company never went into occupation, and it was admitted that the agreements had been entered into solely for the purpose of establishing a standard rent for each of the flats.

Subsequently the flats were let at rents ranging from £78 to £105 a year to occupying tenants. In 1942 the landlord company increased the rent of one of the flats from £78 to £96 a year, and soon after the tenants of all the four flats exercised their right under section 11 of the Act of 1920 of demanding from the landlord a statement of the standard

rent. In reply the landlord company stated the rents of from £210 to £250 mentioned above as the standard rents of the respective flats.

The rateable value of all four flats fell well within the limits for control under the Act of 1939.

The landlord company was then convicted under section 11 of the Act of 1920 of the offence of supplying a statement false in a material particular. On appeal by case stated to the Divisional Court the conviction was upheld, on the ground that the lettings to the company were not real lettings at all and quite ineffectual to fix a standard rent. Macnaghten, J., in delivering the judgment of the Court, said: "But a document may be executed with no intention that it should be acted on, but merely for the purposes of show. The case for Barnes Corporation was that the agreements were shams and, therefore, were not lettings within the meaning of the Rent Restriction Act. That was the view which the petty sessional court and the court of quarter sessions took, and, in our opinion, that view was correct. Indeed it is difficult to see how they could have come to any other conclusion. The letting referred to in the Rent Restriction Act obviously means a real letting by a landlord who really intends to let to a tenant who really intends to take. It does not include a document executed merely for the purpose of being paraded as a document establishing a standard rent."

The decision is important and may have repercussions in other cases. By section 3 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as applied to 1939 Act control by the First Schedule to the Act of 1939, the standard rent of a dwelling-house is the rent at which it was let on September 1, 1939, or where the dwelling-house was not let at that date; the rent at which it was last let before that date, or in the case of a dwelling-house which was first let after that date, the rent at which it was first let. In the numerous cases where the dwelling-house was first let after September 1, 1939, there was an obvious temptation to the landlord to create a standard rent favourable to himself by making the first letting at a high rent, even though he might have moderated the rent soon afterwards. Presumably, if that was a real letting by a landlord who intended to let to a tenant who really intended to take the dwelling-house at that rent, even though there might have been some sort of "gentleman's agreement" that the rent would be moderated later, nevertheless that first letting would have determined the standard rent. There seems at any rate to be no authority at present for doubting that. But where, as in *Conqueror Property Trust v. Barnes Corporation*, the whole thing was purely a patent device to create a theoretical letting, with no intention on the part of either party that the tenant should actually go into occupation of the premises as a dwelling-house, it is now clear that such a "letting" is ineffectual to determine the standard rent.

(Woodfall, 24th edition, p. 358; Supplement No. 3, p. 12;
Rent Restrictions Guide, p. 42.)

Rent Restrictions Acts—apportionment to determine standard rent—any rent charged in excess of the standard rent an "increased rent", even though actually less than the rent previously charged for that dwelling-house.—*Field v. Gover* (1943), 60 T. L. R. 165, discloses a somewhat anomalous working of the Rent Restrictions Acts, upon the injustice of which the Court of Appeal felt constrained to comment.

By section 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, where a controlled dwelling-house is part of another controlled dwelling-house, the standard rent of the first-mentioned dwelling-house is to be ascertained by apportioning the standard rent of the

second-mentioned dwelling-house. This applies even where the first-mentioned dwelling-house—the part—was let before the date when the second-mentioned dwelling-house—the whole—was first let. The apportionment takes place under section 12 (3) of the Act of 1920, under which the decision of the County Court Judge as to the amount to be apportioned is final and conclusive.

By section 1 of the Act of 1920, where the rent of a controlled dwelling-house is increased, then if the increased rent exceeds the standard rent by more than the amount permitted under the Acts, the amount of such increase is, notwithstanding any agreement to the contrary, irrecoverable from the tenant. All the provisions of the Acts mentioned above apply in the case of 1939 Act control.

In *Field v. Gover*, the landlord, who was herself a lessee of the house, had let one room to the tenant Field at the rent of 10s. per week. This letting commenced in 1940. Prior to the outbreak of war this room had been let at 11s. 6d. per week; at that time this room, though not the whole house, probably constituted a controlled dwelling under the Acts of 1920—1938, and 11s. 6d. was then the correct rent for the room under the Rent Restrictions Acts. The room was not let on September 1, 1939, and remained vacant until the tenant Field took it. In 1942 it occurred to Field to apply to the county court to have the standard rent of his room ascertained. The County Court Judge apportioned the rent which the landlord was paying for the whole house as lessee, and determined the standard rent of Field's room to be 3s. 8d. per week. Thus, so long as the room only was controlled the lawful rent for that room was 11s. 6d., but so soon as the remainder of the house was brought under control the apportionment provisions operated to fix a new standard rent of 3s. 8d. for the room. Field then claimed to recover as overpayments the difference between the sum he had already paid as rent and the amount he would have paid if the letting had been at the standard rent.

The question arose whether the difference between these two sums could be said to represent an "increase" of rent, when in fact the rent had never sustained an increase but had actually been reduced, the so-called "increase" over the standard rent being due rather to the fact that, owing to the peculiar operation of the Acts, the standard rent had suffered a considerable diminution in amount.

It was held by a majority of the Court of Appeal (Luxmoore and Goddard, L.J.J.; Scott, L.J., arriving at his conclusion on different grounds) that the "increase" referred to in section 1 of the Act of 1920 is any excess of rent over and above that which is recoverable. It followed that the excess was recoverable by the tenant as overpaid rent. Luxmoore, L.J., expressed his view in these words: "I think that the phrase, 'where the rent of any dwelling-house to which the Acts apply has been since September 1, 1939, or is hereafter increased', can properly be construed as referring to an increase above the standard rent attached or attachable to the dwelling-house to be considered at the named date." Goddard, L.J., expressed the matter as follows: "Once the standard rent has been fixed the tenant could not thereafter be required to pay more. The standard rent operates *in rem*, as has more than once been held in this Court. The effect of this is that the standard rent attaches from the moment when the house is brought under control. There was always from September 1, 1939, a standard rent applicable to the whole house, and there must accordingly always have been a standard rent attaching to any room, which could be ascertained though no-one knew what it was until an application was made to fix it. Indeed, in *Kimm v. Cohen* (1923), 40 T. L. R. 123, it was expressly held by a Divisional Court that the apportionment operates retrospectively, and, in my opinion, the decision was right. Therefore it

seems to me that anything over that sum is made irrecoverable, and we are bound to read section 1 of the Act of 1920 in the same way as did the County Court Judge, with whose careful reserved judgment I feel constrained to agree."

Scott, L.J., took the view that the apportionment provisions of the Acts had no application to such a case at all, and that the standard rent of the room should properly have been fixed at 11s. 6d., but that as the decision of the County Court Judge as to the amount of the standard rent was by Parliament made "final and conclusive" he was bound to give effect to the Judge's decision and the overpayments were therefore recoverable.

Both Luxmoore and Scott, L.J.J., criticised the operation of the Acts in a case such as this. Scott, L.J., pointed out that of two identical houses in the same street, one occupied by the freeholder and the other by a lessee at a rent of £95 a year, a room let in the former might have a standard rent of 11s. 6d. per week while an identical room in the latter would, owing to the apportionment provisions (assuming they applied), have a standard rent of 3s. 8d. Goddard, L.J., observed: "Looking at the Act of 1939 as a whole, I think its object was to stabilise rents at the figures then existing, and I cannot help thinking that, being passed in the hurry that it was with a very large number of other Acts when war was imminent, the position with regard to rooms separately let in controlled houses was overlooked. This extraordinary result seems to follow, that had the former tenant, who was paying 11s. 6d., remained in occupation, he could, directly control was imposed, have gone to the Court and got the standard rent of his room fixed, with the result that the contractual rent would have been reduced by about two-thirds." Goddard, L.J., went on to point out that people who let rooms in their houses are often themselves in quite a humble station of life, and find to their cost that they are engaged in a perilous business, for they cannot be expected to understand such extraordinary provisions even if they do know of them. It does seem reasonable to suggest that Parliament never contemplated for one moment the possible results of this particular part of the Acts as applied to lettings in 1939, and did not appreciate what hardship might thereby be caused. It is, of course, a matter which may be dealt with in the next amending or codifying Act on the subject.

(Woodfall, 24th edition, p. 359; Rent Restrictions Guide, pp. 32, 43.)

Rent Restrictions Acts—deduction permitted from rent during war-time—progressive rent—whether the right to deduct continues as a term of the statutory tenancy.—Two recent cases concerned with progressive rents have clarified a number of points concerning the application of the Rent Restrictions Acts to rents of this kind.

The first of these cases, *Bryanston Property Co. v. Edwards* (1948), 60 T. L. R. 67, concerned a tenancy agreement determinable by either party by one quarter's notice, at a rent of £275 a year, there being a provision that so long as the present war between Great Britain and Germany continued and for three months after the quarter day next following an armistice the tenant could deduct from the rent thereby made payable the sum of £85 a year. The landlord determined the tenancy in accordance with its terms, but the tenant held over as statutory tenant, and the landlord then served on him a notice to pay the full rent of £275 without any deduction.

On these facts it was held by the Court of Appeal (a) that the rent was a progressive rent, (b) that the standard rent was £275, and (c) that the provision for the deduction was a term of the original contract of

tenancy which was carried over into the statutory tenancy, so that the tenant could continue to make the deduction.

The finding on the part of the Master of the Rolls and MacKinnon, L.J., that this was a progressive rent (du Parcq, L.J., differed on this point but concurred in the judgment on different grounds) seems to be in one respect a departure from the view commonly taken hitherto, and involves a number of points regarding progressive rents which are worthy of mention:—

(i) A progressive rent is one which varies by way of increase either by reference to fixed and ascertained periods or by reference to the happening of contingencies (*per* Lord Greene, M.R.).

(ii) A rent may be a progressive rent and yet progress by one step only: there is no reason for stipulating a minimum of two steps in the progression. Strangely enough, the case of *Goldsmith v. Orr* (1920), 89 L. J. K. B. 901, where Bailhache, J., said that there must be a *periodic* increase to constitute a progressive rent, was not referred to in the judgment.

(iii) The fact that the tenant might, by giving notice before then, avoid coming under the liability to pay the advanced rent does not prevent it being a progressive rent; the advanced rent does not have to be payable by the tenant *in any event*.

(iv) The occasion when the rent advances to the higher rate may be the occurrence of an event the date of which is uncertain. (It should be noted that in this case the event was one which, by all human experience, will undoubtedly happen sooner or later: *quære*, whether the advancing of the rent may be made to depend upon the occurrence of an event which may manifestly never happen.)

The reader may find difficulty in following the reasoning of the finding lettered (c) above. It was argued that the provision permitting the tenant to pay a lower rate of rent during the war was merely a stipulation of the contractual tenancy as to the rent to be paid, and on the authority of *Phillips v. Copping*, [1935] 1 K. B. 15, it was contended that the landlord could increase this lower rate of rent to the standard rent. On the face of it there was much in this contention, and in fact the learned Master of the Rolls devoted a large part of his judgment to a careful consideration of this case and the argument founded on it. The line of reasoning by which he distinguished *Phillips v. Copping* was that the provision under consideration was not a mere stipulation as to the amount of the rent. "The landlord puts up the rent to £275. That rent, as I have already said, in my opinion is the standard rent. The question then arises whether, that being the standard rent, the right which had existed in relation to precisely the same rent under the tenancy agreement is imported into the statutory tenancy by virtue of the section [section 15 of the Act of 1920]. It seems to me that a provision, whereby the tenant can satisfy his obligation to pay the higher rent by paying a lower rent, is truly a term of his tenancy, and, accordingly, that his right to make that deduction as against what has now become the standard rent under the statutory tenancy is maintained and preserved."

It seems to the writer that there is here a departure from the basis of the decision that the rent is a progressive one. If the rent is a progressive rent surely that means that during the war the rent is only £190, and the tenant's obligation is limited to the payment of rent at that rate. It is now being said that the tenant's obligation is to pay rent at the rate of £275, but that there is a special term of the agreement to the effect that he can discharge this obligation during the war by the payment of a smaller sum. Perhaps du Parcq, L.J., felt something of this difficulty, for he based his judgment not on the notion that this was a progressive rent but on the basis that the rent was always £275, with this special term

for a deduction from it for the specified period: on this footing it is easier to accept the term as one proper to be carried forward into the statutory tenancy. However, the majority decision is that this was a progressive rent and that the provision for deduction remained binding on the landlord after the tenancy became a statutory one. It is thought that the latter part of the decision is to be applied with caution to other cases, because it is largely dependent upon the particular way the deduction was provided for in the terms of the agreement. It must not be supposed that *Phillips v. Copping* has in any sense been overruled or called in question, but rather that this was a special case where the drafting of the agreement resulted in a different conclusion.

(Woodfall, 24th edition, p. 358; Supplement No. 3, p. 12;
Rent Restrictions Guide, p. 30.)

Rent Restrictions Acts—progressive rent—reduction for period of the war.—The second of the rent cases involving progressive rents was *Tedman v. Whicker* (1943), 60 T. L. R. 107, where a unanimous Court of Appeal consisting of Scott, L.J., and Asquith and Uthwatt, JJ., adopted and followed the opinion expressed by the Master of the Rolls in *Bryanston's Case* as to what constitutes a progressive rent. In this case the rent reserved was £150 a year "except as hereinafter provided". The tenant agreed to keep the garden in a neat and tidy condition, but the landlord agreed that in view of difficulties of labour and materials he would accept a reduction of £38 for the period of hostilities only, the rent to revert to the reserved figure immediately and without notice after the cessation of hostilities. The Court of Appeal held that the rent was £112 during the continuance of hostilities (it may be noted that the agreement defined the hostilities as those in which Britain was engaged at the time of the agreement) and £150 thereafter and that this was a progressive rent, so that the standard rent was £150. The Court, in following *Bryanston's Case*, made observations on one or two further points of interest which arose in this case and are worth noting.

(i) It is not necessary for the agreement to state any reason for the variation stipulated for in the rent, and if a reason is stated it does not matter whether it is a good one.

(ii) For the increased rent to be "payable" within the definition of a progressive rent (s. 12 (1) of the Act of 1920), it is not necessary that it should either have become payable in events which have happened or that it should necessarily become payable under and during the term of the lease or tenancy agreement.

It is to be noticed that in this case also no mention was made in the judgment of *Goldsmith v. Orr* (1920), 89 L. J. K. B. 901.

In conclusion the Court pointed out that the landlord may well have had one eye on the Act when drafting the agreement in this form, but if he has succeeded in creating a progressive rent the standard rent is necessarily determined as laid down in the Act, and the possibility that this affords a loophole in a few cases for the landlord to engineer an unfairly high standard rent (it was not suggested that anything of the sort could be said in that case) is a criticism of the policy of the Act, not an argument on its construction.

(Woodfall, 24th edition, p. 358; Supplement No. 3, p. 12;
Rent Restrictions Guide, p. 30.)

Rent Restrictions Acts—furnished letting—prosecution for charging a rent which yields an extortionate profit—whether the matter “arises” at the time of the letting or each time the rent is received.—Under section 10 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a landlord of a furnished dwelling-house may be prosecuted for charging a rent which yields to him an extortionate profit. By section 11 of the Summary Jurisdiction Act, 1848, the information must be laid within six months of the date when the matter of the information arises. In *Stray v. Docker* (1944), 60 T. L. R. 198, a Divisional Court consisting of Humphreys, Asquith and Cassels, JJ., has held that the matter of the information “arises” whenever and each time the landlord charges the extortionate rent, not once and for all on the occasion of the letting.

(Woodfall, 24th edition, p. 366; Rent Restrictions Guide, p. 70).

Rent Restrictions Acts—husband tenant, wife separated and continuing in possession with husband's consent—summons for possession served on wife.—Peculiar circumstances arose in *Brown v. Draper* (1944), 60 T. L. R. 219. The tenant of a controlled house separated from his wife and allowed her to remain in occupation with his furniture, he paying the rent. After receipt of a notice to quit he ceased paying rent but did not revoke his permission to the wife to live in the house, nor did he remove the furniture. The landlord then issued a summons for possession against the wife, and called the husband as a witness. The husband stated that he had finished with the house and had no further claim to it. It was held by the Court of Appeal that the husband was still in possession, the possession of the wife being in the circumstances regarded as that of her husband; that a statutory tenant can only lose the protection of the Acts either by giving up possession to the landlord or by having an order made against him for recovery of possession, but that the mere statement of his wishes or intentions in proceedings to which he was not a party could not deprive him of the statutory protection; and that the possession of the wife as his licensee was therefore lawful and there was therefore no jurisdiction to make an order for possession against the wife.

As already observed, the circumstances of the case were peculiar; but the principle involved in the case is of extensive importance, the most important application of it being perhaps to the case of a serving soldier who has left his wife in occupation during his absence on service. It is clear that the soldier must be made defendant to the application for possession, if he is actually the tenant. The words of the Master of the Rolls on this point may usefully be quoted: “The argument raises an important question, the answer to which will affect many cases of common occurrence. We will take one example. The tenant of a house held for a fixed term goes abroad on military service, leaving his wife in the house. While he is abroad, the lease comes to an end. At common law the wife thereupon becomes a trespasser and the landlord can take proceedings to recover possession from her. Do the Rent Restriction Acts prevent the landlord from taking this course? In our opinion they do. If the contrary were true, the consequences would be lamentable. In such a case the possession of the wife must, we think, be regarded as the possession of the husband and cannot be treated as unlawful so long as the husband has the right to claim the protection of the Acts. As we have already pointed out, the only ways in which the husband can lose the protection of the Acts are by giving up possession, which in the case assumed he can only do by removing his wife (or, perhaps, by revoking his permission to her to live there) and removing any furniture, etc., which belongs to him, or by having

an order for possession made against him. The right conferred on the husband to claim the benefit of the Acts entitles him, if at the expiration of the tenancy he remains in possession (and possession by his licensee or by leaving, for example, his furniture in the house is sufficient for that purpose), to remain in possession of the house until an order is made against him; and the landlord is no more entitled to treat his licensee as a trespasser than he is entitled to treat the tenant himself as a trespasser. The protection of the Acts, in our opinion, extends to protect a licensee of the tenant, not because the licensee can claim the protection of the Acts in his or her own right, but because the tenant is a necessary party to the proceedings, and no order can be made against his licensee in his absence."

There are many cases during war-time where this decision of the Court of Appeal is in point, and it must be borne carefully in mind in cases where the tenant is a soldier, sailor or airman absent on active service.

(Woodfall, 24th edition, p. 1094; Rent Restrictions Guide, p. 60.)

Dilapidations — defence that the tenant is prohibited under war-time orders from expending the money needed to repair the property.—*Maud v. Sandars* (1943), 60 T. L. R. 81, a decision of Lewis, J., on a dilapidations claim, shows that a tenant cannot successfully raise the defence that under war-time orders (made under the Defence (General) Regulations) he is prohibited from expending more than £100, unless he has applied for and been refused the necessary licence for carrying out the work needed to remedy the dilapidations. The case is not actually authority as to whether the Government prohibition would be a defence even then to a claim for the injury to the reversion occasioned by the dilapidations, since it was decided upon the short ground stated above. It appears, however, to be the view of Lewis, J., that such a defence could not successfully be raised even if the tenant had applied for the requisite licence and been refused. In the words of the learned Judge, "The object of the Legislature in making these regulations was to conserve building materials; they were not aimed at the rights of landlords so as to prevent a landlord recovering in money form damages for dilapidations". This *obiter* appears to be sound, inasmuch as the injury to the reversion remains and the tenant is only being required to pay to the landlord the money he would have expended on repairs but for the Government order prohibiting him from carrying out the work.

(Woodfall, 24th edition, p. 724.)

Option to determine exercised by lessee—construction of covenant to paint "in the last quarter of the said term".—In *Dickinson v. St. Aubyn* (1943), 60 T. L. R. 59, there was a lease for seven years with an option for the lessee to determine the tenancy at the end of five years. The lessee exercised this option. By one of the covenants the lessee covenanted to carry out certain painting "in the last quarter of the said term". It was now contended by the lessee that unless the term ran to seven years this obligation did not arise. Hilbery, J., rejected this argument, holding that by virtue of the exercise of the option the lease became one for five years instead of seven, and that the last quarter of the said term therefore meant the last quarter of the five years' tenancy.

(Woodfall, 24th edition, p. 985; 1 K. & E., p. 957.)

Letting for duration of war—void for uncertainty.—*Lace v. Chantler* (1944), 60 T. L. R. 244, is one of the most important of recent cases on the law of landlord and tenant.

A letting was made "for the duration". It was in this case a letting of a furnished dwelling-house, but the point is immaterial. The Court of Appeal held that the term was void for uncertainty. Lord Greene, M.R., stated his reasons for so holding in these words: "The question arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. A term created by a leasehold tenancy agreement must be a term which is either expressed with certainty and specifically, or is expressed by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. When the tenancy agreement in the present case took effect the term was completely uncertain. It was impossible to say how long the tenancy would endure."

The authority which has always been cited for the validity of a lease for the period of a war is the decision of Rowlatt, J., in *G. N. Ry. v. Arnold* (1916), 36 T. L. R. 114. This decision was felt by many to involve a somewhat questionable principle, but had hitherto stood unchallenged. In *Lace v. Chantler* Lord Greene, M.R., conceded that the decision in *G. N. Ry. v. Arnold* might be supported on the peculiar facts of that case, the landlords having there stated that they did not intend that the tenant should be subject to a week's notice; but as an authority for the general validity of tenancies for the duration of hostilities that case is no longer sound. *Lace v. Chantler* is a clear authority that a limitation for the duration is uncertain, even apart from the fact that many agreements "for the duration" have committed the further error of omitting to state which enemy Power is referred to with reference to the cessation of hostilities.

It is important to note that a lease may still be validly limited for a term measured by reference to some collateral matter, but that collateral matter must be such as to reduce the limitation to a certainty *before the lease takes effect*. Obviously a limitation by reference to the duration of hostilities is not reduced to a certainty until the term has been running for some time—indeed until the very event happens which marks the termination of the lease.

Cautious draftsmen have in fact generally drawn "duration agreements" in the form of a term of, say, twenty-one years, determinable on the termination of defined hostilities. The validity of such a limitation is, of course, in no way impaired by *Lace v. Chantler*; but the case does show that the Court will not stretch a point so as to construe an agreement as a limitation in that form unless it is expressed clearly in that way.

If the tenant has entered into possession and paid rent under a tenancy agreement for the duration of the war now found to be void for uncertainty, the tenant will hold under a weekly, monthly, quarterly or yearly tenancy (according to the period by reference to which the rent was reserved) upon the terms of the invalidated agreement so far as applicable.

(Woodfall, 24th edition, p. 219.)

War damage contribution—meaning of "rent reserved" for the purpose of ascertaining the proportion of rent to the contributory value of the property.—By section 50 of the War Damage Act, 1943, the proportions of war damage contribution to be borne respectively by landlord and tenant are made to depend, *inter alia*, upon the proportion borne by the rent reserved to the contributory value of the property.

The effect of the decision in *Duke of Westminster v. Store Properties* (1943), 60 T. L. R. 146, is that the expression "rent reserved" is to be

understood in its technical sense and is limited to a rent which arises on the occasion of a demise and is the subject of a reservation out of a demise. A sum payable by the tenant under a collateral agreement containing no demise is not a "rent reserved".

In this case a house was let on a ground lease for ninety years at £125 a year, subject to a covenant to use the same only as a private residence. In 1936 the landlord granted a licence to convert the house into office premises subject to the payment during the period they were so used of an additional "rent" of £50 a year. It was held by Bennett, J., that this payment was not "rent reserved" within section 50. In his own words, "The truth is that the sum in question is not the consideration for the demise of the land comprised in the original lease, but is the consideration payable under a collateral agreement to enable the tenant to do on the land then vested in him an act which otherwise he could not lawfully do". Bennett, J., referred to *Donellan v. Read* (1832), 3 B. & Ad. 899, for the definition of rent as "a sum reserved by a lessor on the occasion of a demise of land".

It may be that the position might have been different had the licence taken the form of a new demise in consideration of the rent being increased by £50 a year. This seems to have been recognised by Bennett, J., the determining factor being the nature and mode of the reservation.

(Woodfall Supplement No. 3, pp. 57, 137.)

4. *INCOME TAX CASES.*

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[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Surtax—income of investment company—apportionment—“able to secure that income will be applied for his benefit”—*Finance Act, 1939, s. 15.*—Section 15 of the Finance Act, 1939, forms part of the companies surtax code and is concerned with the apportionment of the income of investment companies. It empowers the Special Commissioners to apportion such part of the income as appears to them to be appropriate to any person who, though not a member of the company within the meaning of the companies surtax legislation, "is, or is likely to be, able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit". The words in quotation marks appear also in the definitions of certain other classes of persons who are singled out by the section for special treatment in the matter of apportionment. Sub-section (3) of section 15 provides that "for the purposes of this section, a person shall be deemed to be able to secure that income or assets will be applied for his benefit if he is in fact able so to do by any means whatsoever, whether he has any rights at law or in equity in that behalf or not". The same sub-section empowers the Special Commissioners to draw the inference that a person is likely to be able to secure that income or assets will be applied for his benefit if, and only if, they are satisfied (*inter alia*) "that the persons who . . . have, or will at any material time have, powers or rights affecting the disposal or application of the income or assets of the company are likely to act in accordance with his wishes or that he is able to secure that persons who at the material

times will have such powers or rights will be persons likely to act in accordance with his wishes". In the light of sub-section (3), and especially of the words "by any means whatsoever", what is the true construction of the words "is, or is likely to be, able to secure"? This was the question considered by the Court of Appeal in *C. I. R. v. L. B. Holdings, Ltd.*, [1944] 1 A. E. R. 308. In order to understand the decision it is unnecessary to look closely at the somewhat complicated facts of the case. The Court of Appeal held, in the first place, that full weight must be given to the word "secure", which imports certainty. The question is whether the person concerned is, or is likely to be, able to put himself in such a position that he is sure of obtaining and retaining the benefit. A mere possibility will not suffice. Secondly, the words "by any means whatsoever", wide as they are, are not equivalent to "*per fas aut nefas*". It is irrelevant to inquire what could be achieved by the commission of a crime. Thirdly, an unlawful act falling short of crime may be within the words "by any means whatsoever" if, but only if, acquiescence or condonation on the part of other persons can put the wrongdoer in the same position as if his conduct had been lawful from the first and there is evidence to warrant a finding that such acquiescence or condonation would, in fact, be forthcoming. On the other hand, if the person concerned can, in fact, count upon the concurrence or co-operation of all persons whose concurrence or co-operation is required, then—to quote *du Parcq, L.J.*—"it matters not whether those persons will be induced to do so by persuasion or from motives of benevolence or affection or of self-seeking, or by reason of some unenforceable promise". Leave was given to appeal to the House of Lords, and more may be heard of the case.

Surtax—life interest in trust property—income accumulated during infancy—Trustee Act, 1925, s. 31.—The decision of the High Court in *Stanley v. C. I. R.*, [1943] K. B. 717, was noted in *The Conveyancer* for December, 1943, at p. 124. That decision has now been reversed by the Court of Appeal, [1944] 1 A. E. R. 230. The question at issue turned on the effect of section 31 of the Trustee Act, 1925, which provides, so far as material, that where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, during the infancy of that person, the income shall be applicable, at the discretion of the trustees, for his maintenance, education or benefit, and the residue shall be accumulated. If he attains the age of twenty-one and his interest in the income during his infancy was a vested interest, he becomes absolutely entitled to the accumulations. If he dies before attaining the age of twenty-one, the accumulations are to be held as an accretion to the capital of the property from which they arose. This will apply even where the infant's interest was a vested interest, whereas under the law as it stood before the enactment of the Trustee Act, 1925, the accumulations up to the time of the death would, where the interest was a vested interest, have passed to the infant's next-of-kin as on an intestacy. In *Stanley v. C. I. R.*, above, the infant had a vested life interest in certain trust income. He attained the age of twenty-one and became entitled to the accumulations. It was sought to assess him to surtax by way of additional assessments on the footing that during his infancy the income, as it arose, was his income. It was contended on his behalf that in the light of the change in the law effected by section 31 of the Trustee Act, 1925, his interest in the income during his infancy ought to be considered to be a contingent and not a vested interest. It has now been held by the Court of Appeal that this view is correct. The Master of the Rolls pointed out in his judgment that the

taxpayer's interest during his infancy could not properly be described as a defeasible interest, in the sense of a vested interest subject to divestment in the event of his dying before attaining the age of twenty-one. During his infancy the title to the surplus income was held in suspense to await the event. The real effect of section 31 of the Trustee Act, 1925, was to engraft upon the vested interest a qualifying trust which conferred upon the infant a title to the accumulations if, and only if, he attained the age of twenty-one. *Gascoigne v. C. I. R.*, [1927] 1 K. B. 594, which was pressed upon the Court, was distinguished on the ground that in the case of both the gifts there in question the beneficiary had throughout a vested interest of such a nature that, had she died an infant, the accumulations up to her death would have formed part of her estate.

Income tax — tax-free annual payments — “stated amount” — Finance Act, 1941, ss. 25 and 27.—In *Holmpatrick v. Ainsworth*, [1943] S. C. 75, the Court of Session had before it an interesting question on the application of section 25 of the Finance Act, 1941. The effect of that section is that, in the case of certain classes of tax-free annual payments, the “stated amount” is to be reduced by nine twenty-ninths. After a decree of divorce the husband (the defendant in the action) had entered into an agreement with the wife (the plaintiff) as to the provision to be made for her maintenance. There had been a marriage settlement, under which the husband's fund was held on trust (*inter alia*) to pay the income to the husband during his life. By the agreement between the parties after the divorce the husband assigned to the wife his life interest in his portion of the marriage settlement funds. He further agreed to pay to the wife in every year “such sum as will, when added to the net income arising from the trust funds in that year, leave a sum of £1,200 after deduction of income tax at the current rate”. When the action came on appeal before the Court of Session, the plaintiff did not dispute (though the contrary had been argued in the Court below) that section 25 applied. The question to be decided was whether the “stated amount” was to be taken to be £1,200, as contended by the husband, or, as contended by the wife, the amount by which the net income of the husband's portion of the trust fund fell short of £1,200. The Court decided by a majority (Lord Jamieson dissenting) in favour of the husband, holding that the trust income receivable by the wife was provided by the husband, since it reached her, not as a beneficiary under the settlement, but as the husband's assignee; that accordingly the agreement, taken as a whole, contained a “provision”, within the meaning of section 25, for the payment to the wife of £1,200 a year tax free; and that it made no difference that the £1,200 was composed of two ingredients—the trust income handed on by the trustees after suffering deduction of tax at the source, and the supplementary payment by the husband of a net amount equal to the difference between the net amount of the trust income and £1,200. Section 27 (1) (b) of the 1941 Act provides that the expression “a stated amount” shall not be taken to include “a stated fraction of the net amount of any specified income”. It was argued that “a stated fraction” must include the whole and that accordingly, apart from other considerations, section 27 (1) (b) took the payments of trust income outside the operation of section 25. The majority of the Court rejected this contention on the ground that section 27 (1) (b), while clearly applicable to a simple provision for the payment of the net income of a given fund, was not applicable where this was accompanied by and bound up with a provision for a supplementary payment of such amount as might be required to leave a stated amount in the hands of the payee. In other words, the trust income must be regarded

as merely a component part of the "stated amount" of £1,200, and, in the view of the majority of the Court, it made no difference that part only of that "stated amount" was to be provided directly by the husband and the remainder indirectly through the medium of the trust.

Income tax — mortgage interest — capitalisation of unpaid interest — Income Tax Act, 1918, All Schedules Rules, rule 21.—The judgment of the Court of Appeal in *C. I. R. v. Lawrence Graham & Co.*, [1937] 2 K. B. 179, decided two points—first, that a provision in a mortgage deed by which the mortgagee is given the right to capitalise the net amount of unpaid interest is valid, and, secondly, that on payment of the amount of net interest so capitalised no assessment can be made under rule 21 on the person by or through whom the payment is made. This decision was applied by Macnaghten, J., in *C. I. R. v. Oswald (Cosier's Settlement Trustee)*, [1943] 2 A. E. R. 754. The material facts were that B, having a reversionary interest in the funds comprised in a marriage settlement, had mortgaged her interest as security for advances made to her by L. The mortgage deed provided that if the interest on the advances was not paid within twenty-one days of the due date, it might, at the option of the mortgagee, be capitalised. After L's death, the trustees of her will exercised this option and capitalised "so much of the interest fallen due on the principal sums . . . as is now capable of being capitalised" by virtue of the provisions of the deed. B's reversionary interest fell in after her death. The surviving trustee of the marriage settlement proceeded to satisfy the claims of the trustees of L's will, which were met in full, including the claim to the capitalised interest. An assessment under rule 21 was thereupon made on the marriage settlement trustee in respect of so much of the payment as exceeded the amount of the advances, on the footing that this was a payment of interest. Unlike the mortgage deed considered in *Lawrence Graham's Case*, above, the deed in this case did not provide *simpliciter* for the capitalisation of unpaid interest but merely gave the mortgagee an option. This distinction was held to be immaterial. Again, in *Lawrence Graham's Case* the provision for capitalisation related in terms to the *net* interest, whereas in the present case the expression used was simply "the interest". The learned Judge pointed out, however, that what L's trustees had purported to capitalise was "so much of the interest . . . as is now capable of being capitalised", and that their claim in respect of capitalised interest represented the capitalisation of the *net* interest. In the light of these considerations, the learned Judge held that *Lawrence Graham's Case* was indistinguishable and affirmed the decision of the Special Commissioners to that effect.
